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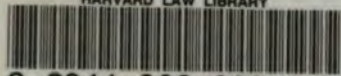
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REPORTS
OF
CASES
ARGUED AND DETERMINED
IN THE
SUPREME JUDICIAL COURT
OF THE
COMMONWEALTH OF MASSACHUSETTS.

VOL. VII.

CONTAINING THE CASES FROM SEPTEMBER TERM, 1810, IN HAMPSHIRE,
TO SEPTEMBER TERM, 1811, BERKSHIRE, INCLUSIVE.

By DUDLEY ATKINS TYNG, Esq.
COUNSELLOR AT LAW.

WITH NOTES
AND
REFERENCES TO THE ENGLISH AND AMERICAN CASES.

By BENJAMIN RAND, Esq.
COUNSELLOR AT LAW.

BOSTON:
LITTLE, BROWN AND COMPANY.
1864.

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CASES
ARGUED AND DETERMINED
IN THE
SUPREME JUDICIAL COURT,
IN THE
COUNTY OF HAMPSHIRE, SEPTEMBER TERM, 1810,
AT NORTHAMPTON.

PRESENT:

HON. THEOPHILUS PARSONS, CHIEF JUSTICE
HON. THEODORE SEDGWICK, }
HON. SAMUEL SEWALL, } JUSTICES.
HON. ISAAC PARKER, }

**THE INHABITANTS OF GRANBY *versus* THE INHABITANTS
OF AMHERST.**

After the provincial act of 7 G. 3, c. 3, and before the statute of 1789, c. 14, no settlement could be gained, but by the approbation of the town at a general meeting.

A student of a college does not change his domicile by his occasional residence at the college.

The personal occupation of lands, required by the statute of 1789, includes an occupation by others under the direction and control of the owner.

But lands leased are not within the statute.

A seisin and occupation by a minor gave a settlement by that statute, although his lands were in the care of his guardians.

But by the statute of 1793, c. 34, a freeholder must be of full age to gain a settlement.

Assumpsit for money expended by the plaintiffs in the support and maintenance of one *Eli Emmons*, a pauper, whose settlement they allege to be in *Amherst*.

The question, whether the defendants are liable to refund the money so expended by the plaintiffs, was submitted to the determination of the Court upon a case stated by the parties.

The case states that *Robert Emmons*, and the pauper, his son, had their legal settlement in *Amherst*, on the first of May,

1780: the father then removed, with his son, a minor, [* 2] * to *Granby*, where the father occupied lands, of which he was seised in fee, of the value of 500 dollars, and for which he paid taxes. In the autumn of 1784, *Robert*, with his said son, removed from *Granby* to *Belchertown*, upon lands, of which *Robert* was seised, of the value of 300 dollars, and which he occupied, and for which he paid taxes, his son *Eli* living with him until his death, March 14th, 1790. The lands descended to the pauper, his only son and heir, he being then a minor. From his father's death the pauper lived with his guardians, in *Belchertown*, until the latter part of August, 1795, except when he was absent at *Dartmouth* college, where he was four years, and until he received his degree. On the 14th of March, 1795, he came of age, and on the 28th of July, in the same year, he sold the said lands. For the period of two years and more from his father's death, the same lands were of the clear yearly value of 10 dollars and more, and during that time in the actual occupation and improvement of his guardians, for his sole use and benefit.

The parties agreed that at the time of *Robert's* removal from *Amherst* to *Granby*, he was lawfully settled in the former place, and that he so continued until his death, unless, by the facts agreed, he lost his settlement by gaining a new one in some other place; and that the said *Eli*, the pauper, was also so settled in said *Amherst*, at the time of his father's removal therefrom, and so continued until the commencement of this action, unless, from the facts agreed, he had gained some other settlement.

It was also agreed that if, upon these facts, the Court should be of opinion that the said *Eli* was lawfully settled in *Amherst*, judgment should be rendered for the plaintiffs for a sum agreed in damages with costs; otherwise the defendants were to recover their costs.

Ashmun, for the plaintiffs, relying on the settlement of the pauper in *Amherst*, as agreed in the case, considered the burden thrown on the defendants to prove a posterior settlement elsewhere.

[* 3] * *Dickenson*, for the defendants, argued that the pauper, being irremovable from his freehold in *Granby*, acquired a legal settlement in that place.

GRANBY vs. AMHERST.

PARSONS, C. J. (after stating the facts.) Upon these facts we are to decide whether the pauper's settlement remained in *Amherst*, or whether he has gained a new settlement. If the pauper has gained a new settlement, it must be either in *Granby* or *Belchertown*.

Until the statute of 1789, c. 14, a new settlement could not be gained, after the statute of 7 G. 3, c. 3, but pursuant to the provisions of this last statute; by the fourth section of which it was enacted, that no person, after the tenth of April, 1767, coming to reside or dwell in any town, shall gain a settlement in any such town, unless he first obtain the approbation of the town at a general meeting; nor shall any town be at charge for the support of any person residing in such town, unless he shall have obtained such approbation.

From this provision it is manifest, that neither *Robert*, the father, nor his son, the pauper, gained any settlement in *Granby* by residence there; nor by the father's owning a freehold there. For although a man is not removable from his freehold, yet he gained no settlement by it; nor could he in any other way than by the approbation of the town. Irremovability and settlement have not the same effect. By the statute of 1793, c. 34, a man cannot gain a settlement in any other way than is there described. But a freehold of the clear yearly income of 10 dollars, in the town where he lives, will gain a settlement. He may have a freehold of less value; but he gains no settlement by it. (*Vide 3 Mass. Rep. 436, Inhabitants of Salem vs. Inhabitants of Andover.*) *Robert*, the father, therefore gained no settlement for himself, nor for his son, in *Granby*.

After he removed to *Belchertown*, if he acquired any settlement there, it was by force of the statute of 1789, c. 14: by the first section of this statute, it is, among other things, enacted that every person, being a citizen of the commonwealth, *who shall be seised of any estate of freehold, in any [* 4] town, of the clear annual income of 10 dollars, and shall reside thereon, or within the same town, occupying and improving the same in person, for the space of two whole years, shall have his settlement in the same town.

Robert was seised in *Belchertown*, when he removed to that place, of a freehold of a greater clear yearly value than 10 dollars, which he occupied and improved personally; but he died within two years after the passing of the statute. He therefore gained no settlement in *Belchertown*; and the last inquiry is, whether the pauper, after his father's death, gained a settlement in that town.

The statute of 1789 passed on the 23d of June in that year, and was repealed by the statute of 1793, c. 34, which passed February 11th, 1794, after an interval greater than two years. This last statute enacts, that all settlements then existing should remain, until new settlements should be acquired under that statute. And in the case of *Salem vs. Andover*, it was determined that a citizen, seised of a freehold of a clear yearly value of 10 dollars in his own occupation for two years, gained a settlement in the town where his freehold lay, he living in such town.

The pauper, in the case at bar, became seised of his freehold on the death of his father, March 14th, 1790, and continued so seised until his alienation, on the 28th of July, 1795. From his father's death to the 11th of February, 1794, when the statute of 1789 was repealed, is more than two years.

But the seisin of such a freehold for two years is not sufficient to gain a settlement. The owner must be a citizen of the commonwealth; he must reside within the town in which it is situate; and he must occupy and improve it personally.

There is no question of the citizenship of the pauper. But did he reside, during the two years, in *Belchertown*? From March 14th, 1790, to the latter part of August, 1791, he lived in [* 5] *Belchertown*. He then became a student of * *Dartmouth* college, where he continued four years. And it is a question whether, during that period, he resided in *Belchertown*. He was abroad merely for his education; during the vacations, he was at his home in *Belchertown*; and on receiving his degree, he continued his residence in the same place. His absence was occasional, and for a particular purpose; and we are satisfied that within the intent of the statute, there was no change of his domicile. His home was at *Belchertown*; it was the place of his residence, although from home for the purpose of instruction. A seafaring man, having lands occupied by himself, or his servants or hired people, although frequently absent on long voyages, has always been considered as having his residence on his lands, and as not losing his domicile by following his profession. (4 *Mass. Rep.* 312, *Abington vs. Boston*.) We think, therefore, that the pauper's residence was in *Belchertown*, while he was a student at *Dartmouth* college. (a)

But he must have occupied and improved his lands *personally*. It is not to be supposed from this expression, that his lands must be cultivated by his own hands. If the labor be performed under his direction, by his factors or hired men, for his use; or if the lands be managed under the direction of any agent or attorney

GRANBY vs. AMHERST.

authorized to employ laborers, the owner may be considered as personally occupying them. Not so if the lands are demised, so that the lessee has the right of occupation against the lessor.

The pauper during these two years was a minor; and it has been objected that a seisin and occupation by a resident minor is not within the statute. The legislature has prescribed the terms by which a settlement may be gained. The statute does not expressly require the owner to be of full age. If he be seised of an estate of the value required, reside in the town where it is situate, and personally occupy it, the statute requires no more to give him a settlement. Now, a minor can do all this; and if disturbed in his seisin, or occupation, he may maintain trespass in his own name, *suing by his next friend. The legislature, perhaps [* 6] conceiving an inconvenience in the gaining of a settlement by the seisin and occupation of a minor freeholder, has, by the statute of 1793, introduced a provision, requiring the freeholder to be of full age. But we must decide according to the former statute, and not defeat rights acquired under the repealing statute.

A minor can lease his lands, and transfer the occupation to his lessee. And if his guardians occupy, or direct the occupation for the use of the minor, the lands may still be considered as in his personal occupation; the guardians appointed by our laws being agents of their ward, having an authority not coupled with an interest. But where the guardians demise the lands, which they are authorized to do, and which in the case before us it is agreed they did do, the occupation is in the lessee, and not personally in the ward.

Upon the whole, it appears to us that *Eli Emmons*, the pauper, not having acquired a settlement, either in *Granby* or *Belchertown*, his original settlement in *Amherst* remained, and that the plaintiffs are therefore entitled to judgment.

JUSTIN LEONARD *versus* DANIEL WHITE.

By a grant of a grist-mill *with the appurtenances thereon*, the soil of a way, immemorially used for the purpose of access to the mill from the highway, does not pass.

TRESPASS for breaking and entering the plaintiff's close, situate in *West Springfield*, and beating and driving away the team of the plaintiff, viz., one horse and one yoke of oxen, &c.

The declaration contained several counts, and the defendant pleaded a number of pleas in bar. That on which the question, which came before the Court, arose, alleges in substance, that the defendant and his wife were seised in their right of the *locus in quo*, and because the horse and oxen of the plaintiff were there doing damage, the defendant rightfully removed them. The replication traverses the seisin alleged in the plea, and tenders an issue, which is joined by the defendant.

[* 7] * From the report of *Sedgwick, J.*, who sat in the trial of this issue, it appears that one *Asaph Leonard*, before and until the 4th day of April, 1789, was seised in fee of an ancient grist-mill, which stood at the distance of several rods from the highway, and of the land between the mill and the highway, over which land there is a way, which has been immemorially used for the purpose of access to the mill from the highway, and, as was understood, for no other purpose; and this way was the *locus in quo*. On the day above mentioned, the said *Asaph* conveyed, by deed in fee tail, to the defendant and his wife certain land, comprehending that on which the grist-mill stands, except two third parts of the mill privilege, which he reserved to himself; and this conveyance was made in that manner, "*with the appurtenances thereon.*" After the decease of the said *Asaph*, the devisees of his real estate conveyed to the defendant all their interest and estate in the said grist-mill; "*with all the privileges and appurtenances thereunto belonging.*"

Upon this evidence the jury were directed to find their verdict, upon this issue, in favor of the plaintiff, which they accordingly did, the defendant moving for a new trial, as for a misdirection of the judge.

Bliss, for the defendant, agreed that the *locus in quo* is not within the land described in *Asaph Leonard's* deed, but he argued that, the way having been immemorially used with the mill, the soil thereof passed by the deed as appurtenant to the mill; and he cited *Co. Lit.* 5, b. By the grant of a messuage, or house, an acre or more of land may pass. (*Com. Dig. Title Grant, E. 9.*) By the grant of a messuage, *cum terris pertinentiis*, land occupied continually with the house passes. (*Cro. Eliz.* 113, *S. P.*) And although land may not pass as appurtenant to land, yet it may as appurtenant to a mill, or it may be considered as parcel thereof, if they have been enjoyed together for a long time. So where one granted a mill, *cum pertinentiis*, it was held that a kiln at the end of the close, wherein the mill stood, would have passed with the mill, if it had been found that *the kiln was necessary to the mill. (*Bac. Abr. Title Grants, I. 4.*)

Hooker and Lathrop for the plaintiff.

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The opinion of the Court was afterwards delivered by
 SEDGWICK, J. (after stating the substance of the report.) It
 is not contended in this case, on the part of the plaintiff, that the
 conveyance, mentioned in the report, does not operate as the grant
 of an easement for the accommodation of the mill, by means of the
 way which has been mentioned; but it is contended that it cannot
 be considered as a grant of the *soil* over which the way passed;
 and, on the other side, it is insisted that the deed ought to be con-
 sidered as a grant of the *land*.

It is agreed that the *locus in quo* is not within the lines desig-
 nating the limits of the grant. And as the seisin of the defendant
 and his wife *in the land* is put in issue, the question is, whether
 the *soil* was conveyed by the expression "with the appurtenances
 thereon."

An appendant or appurtenant is a thing used with, and related
 to, or dependent upon another thing more worthy, and agreeing in
 its nature and quality with the thing whereunto it is appendant or
 appurtenant. (1) The way then, as an easement, might be append-
 ant or appurtenant to the mill; but the soil, over which the way
 went, could not.

An appendant is that which, beyond memory, has belonged to
 another thing more worthy, and which agrees with that to which
 it is related, in its nature and quality; and an appurtenant is that,
 the commencement of which may be known. (2) Appendances
 and appurtenances will pass by the words, "with the appurtenances
 thereunto belonging," or by other tantamount expressions.

By the grant of a messuage, *cum pertinentiis*, a shop, annexed to
 it for thirty years, does not pass, unless it be found to be a parcel
 of the messuage. (3) By the grant of a house or land, *cum perti-
 nentiis*, another house or land does not pass, unless it be
 found to be a parcel. (4) By the grant *of a mill, *cum* [* 9]
pertinentiis, the close where the mill is, or the kiln *there*,
 does not pass without some further expression. (5) Land cannot
 be appendant to land. (6) Nor can it be appendant to a meadow
 or messuage. (7) So a meadow cannot be appurtenant to a pasture,
 nor a pasture to a wood. (8)

From these authorities it is evident that the deed in question
 did not convey the soil, over which the way went, to the defend-
 ant and his wife; and, therefore, will not support this issue on his
 part.

(1) *Co. Lit.* 121, b. 122, a.

(2) *Co. Lit.* 121, b. *Com. Dig.* Appendant and Appurtenant, A.

(3) *Cro. Car.* 17.

(4) 1 *Ler.* 131.

(5) 1 *Sid.* 211. — 1 *Ler.* 131.

(6) 1 *Rol.* 230, l. 50

(7) *Plow. Com.* 170 b.

(8) *Plowd.* ubi supra.

Nor can the defendant better avail himself of the deed of the devisees of *Asaph Leonard* to him, inasmuch as it is a conveyance to himself alone, whereas his plea sets up a joint seisin in himself and his wife; and, further, this last deed is subject to the same objections as that which has been already considered; there being no pretence that the soil, in the *locus in quo*, was conveyed by this latter deed, except as appurtenant to the subject of the grant.

We are, for the reasons which have been given, all of opinion that the direction, and the finding of the jury, upon this issue were right.

Judgment on the verdict

COMMONWEALTH versus THE INHABITANTS OF SPRINGFIELD

The acts prescribing the limits of counties and towns are public acts, of which the Court will judicially take notice.

The duty of repairing highways is enjoined on towns wholly by statute; and an indictment against a town, for neglect of this duty, must allege the offence *contra formam statuti*, or it will be quashed.

At the Common Pleas, for this county, November term, 1808, an indictment was found by the grand jury, charging, "that there is, and for a long time hath been, a certain common highway, leading from *Chicopee* road, so called, in the town of *Springfield*, to the town of *South Hadley*, in said county, by a place called the *Slabury Ponds*, used by and for all the citizens of this commonwealth, with their horses and carriages, to go, pass and [* 10] repass, at their free * will and pleasure; and that a certain part of the same common highway, two miles in length and two rods in breadth, within the said town of *Springfield*; that is, one mile measuring each way from a spot in said road, where it runs nearest to the ponds aforesaid, on the first day of July last past, and continually afterwards, until the day of finding this presentment, at *Springfield* aforesaid, was, and yet is ruinous, &c., for want of due reparation and amendment of the same, to the great damage and common nuisance of all the good citizens of this commonwealth; through and over the same way passing and repassing, against the peace of this commonwealth, and the dignity of the same. And the inhabitants of the said town of *Springfield*, in the county aforesaid, the common highway aforesaid, so as aforesaid being in decay, ought to repair and amend, when and so often as it should, or shall, be necessary."

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The defendants demurred generally to the indictment, and the commonwealth joined in demurrer. The proceedings being removed into this Court by appeal, the demurrer was argued at the last term in this county by *Bliss* for the defendants, and *Bidwell*, attorney-general, for the commonwealth.

Bliss, in support of the demurrer, contended, 1. That the high way is not alleged to be either within the town of *Springfield* or in the county of *Hampshire*. The description, from a place in *Springfield* to the town of *South Hadley*, in said county, does not show that any part of the way is in *Springfield*; nor, if it did, does it appear that that town is within the county of *Hampshire*. Nothing is to be presumed in construing an indictment, and especially upon a demurrer. (1)

2. This indictment lays the offence at common law, whereas it is by virtue of our own statutes only, that towns are obliged to keep highways in repair, and the indictment ought to have concluded *contra formam statuti*. (2)

3. The Common Pleas have no jurisdiction of the offence.

* *Bidwell* contended that it sufficiently appeared from [* 11] the whole indictment that the highway, charged to be defective, was within the town of *Springfield*, and, also, that that town was within the county of *Hampshire*. As to the offence being laid at common law, towns were obliged before the statute to repair highways, and the statute is only in affirmance of the usage, or common law, of our country. The punishment for their neglect is wholly by force of the common law. Indictments for this offence have been, from time immemorial, found at the Sessions, to which the Common Pleas have succeeded, and no exception was ever taken to their jurisdiction.

The action stood over for advisement to this term, and now the opinion of the Court was delivered by

PARSONS, C. J. The defendants are indicted for not repairing a common highway, which it is alleged that they ought to repair. They have demurred to the indictment, and the attorney for the commonwealth has joined in demurrer.

Three exceptions are taken to the indictment; that the defective road is not described as lying in the county of *Hampshire*; that the indictment concludes as for an offence at com-

(1) 3 D & E. 513, *Rez vs. Inhabitants of Gamlingay*.—1 *Conop*. 111, *Rez vs. Inhabitants of Hartford*.—2 *Saund*. 158, b., *Rez vs. Sloughton*. *Notes* 5 and 6, by *Williams*.—1 *Burr*. 376, *Hammond vs. Brewer*.—2 *Roll. Abr.* Title *Indictment*, M pl. 19.

(2) 6 *East s Rcp*. 126, *Rez vs. Southerton*.

mon law, and not against the form of the statute; and that the Common Pleas, where the indictment was found, had no jurisdiction.

The road is described as "leading from *Chicopee* road, in the town of *Springfield*, to the town of *South Hadley*, in said county;" and it is alleged that two miles in length of the said road, within the said town of *Springfield*, was, and yet is, ruinous, to wit, at *Springfield* aforesaid; and that the inhabitants of the said town of *Springfield*, in the county aforesaid, ought to repair the same.

The indictment was drawn without much attention; and the defendants have argued that, although in the latter part of the indictment *Springfield* is described as within this county, yet the location of the defective part of the road, in *Springfield* [* 12] aforesaid, is insufficient, because the Court cannot judicially presume that the whole of that town is within the county; for in fact there are towns which lie part in one county and part in another county.

The objection by the common law of *England* might prevail, as in the case of *The King vs. Burridge*, (3 P. Will. 496,) because the judges cannot presume that the whole of a township or parish lies in the same county. In *England* the limits of the several counties and parishes are not ascertained by public acts of parliament, the records of which are remaining; but they are determined by ancient usage, of which the judges cannot judicially take notice.

The case is different in *Massachusetts*. Our county limits, and also the boundaries of our several towns, are prescribed by public statutes, of which we are bound judicially to take notice. When, from these limits or boundaries, it appears that every part of any town is in the same county, of that fact we can judicially take notice. Now, as judges, we know from our several public statutes, that *Springfield* lies wholly in the county of *Hampshire*. When, therefore, the indictment alleges, that the inhabitants of said town of *Springfield*, in the county of *Hampshire*, ought to repair, and that the defective road lies in *Springfield* aforesaid, we can take notice that the defective road lies also in the county of *Hampshire*.

This objection was made to an indictment in *Essex*, against one *Fairfield*, but was overruled; and the same objection was also made in the county of *Worcester*, to an indictment against one *Davis*, for forgery, but did not prevail.

When, from the terms of the location of a town or district, by the act of incorporation, we cannot conclude that the whole town

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or district lies in one county, then the indictment ought to describe the offence as committed, not only in such town, but also in the county where it is found. And in places unincorporated, a similar certainty will be expected.

On the whole, we are satisfied that this objection to the indictment is insufficient.

*This opinion is confined to indictments for misde- [* 13] meanors, and for felonies not capital. But in indictments for capital offences, the strictness of requiring the indictment to allege the offence as committed, not only in a certain town, but also in a certain county, has always been adhered to; and in favor of life the Court, perhaps, would not feel authorized to depart from the ancient rule. Indeed, in all cases it would be prudent for those who draw indictments to adhere to the old practice; because there are towns which do not lie wholly in one county, and also unincorporated plantations, the location of which we cannot judicially know.

To the objection, that the indictment does not conclude against the form of the statute, the attorney-general has admitted, that generally an indictment for an offence, not at common law, but by statute, must conclude against the form of the statute; but he has endeavored to take this case out of the general rule. The statute enjoins on towns the duty of repairing all defective highways within their limits; but does not declare a neglect of this duty to be indictable; the indictment lies, then, at common law, which prescribes the remedy where the statute is silent. On this ground he has argued, that this indictment need not conclude against the form of the statute.

But we are satisfied that this objection must prevail, unless we overturn an ancient and well-established rule of law. Sergeant *Hawkins* lays it down as a common ground, that a judgment by statute shall never be given on an indictment at common law, as every indictment, which doth not conclude *contra formam statuti*, shall be taken to be. And, therefore, if an indictment do not conclude *contra formam statuti*, and the offence indicted be only prohibited by statute, and not by common law, it is wholly insufficient, and no judgment at all can be given upon it. (2 *Hawk. P. C.* c. 25, § 116.) The duty of repairing a highway is enjoined on towns in this state, not by the common law, but only by statute; and a breach of that duty is a violation of *the statute. [* 14] And although the common law furnishes a remedy, yet the wrong is not a breach of any rule or maxim of the common law; but is a disobedience to the statute, and the indictment ought to have concluded *contra formam statuti*. On the ground of

this objection, it is our opinion that the indictment is insufficient, and must be quashed. (a)

It is unnecessary to decide on the third objection taken to the indictment, founded on the supposed want of jurisdiction of the Common Pleas.

Indictment quashed.

(a) [*Commonwealth vs. Cooley*, 10 Pick. 37. — *Commonwealth vs. Gay*, 5 Pick. 44. — *Commonwealth vs. Hooper*, 5 Pick. 42. — *Commonwealth vs. Stockbridge*, 11 Mass Rep. 279. — *Commonwealth vs. Morse*, 2 Mass. Rep. 138. — *Haskell vs. Moody*, 9 Pick. 172. — Ed.]

JOHN FOWLER versus DANIEL SHEARER.

Where one conveys land as the attorney of another, he must do it in the name of his principal, and as his act, and not as the act of the attorney.

A wife may bar herself of dower by joining her husband in a deed of conveyance, relinquishing her claim to dower, and putting her seal to the deed.

Or she may do it by her separate deed, subsequent to and in consideration of her husband's sale.

So she may pass her own land by deed executed by her jointly with her husband; but her covenants in such deed have no operation but by way of estoppel.

Her separate deed is *ipso facto* void, as are all the covenants contained in it.

If a promissory note be given without any consideration, it is *nudum pactum*, and void as between the parties.

Where an attorney had a promissory note committed to him for collection, and receiving a partial payment of the debtor, paid it over to the creditor, without endorsing it on the note, and afterwards obtained judgment on the note, he was held liable to the debtor for the amount of such partial payment, in an action for money had and received.

THE declaration in this action, which was *assumpsit*, contained six counts. The first was on a promissory note, for 200 dollars, made by the defendant, payable to the plaintiff on demand, and dated August 7th, 1805. The second was *indebitatus assumpsit* for depasturing cattle. The third was a similar count for the use and hire of a chaise. The fourth was a *quantum meruit* for the articles mentioned in the two preceding counts. The fifth was *indebitatus assumpsit* for goods sold and delivered. And the sixth was a like count for money had and received.

A trial was had upon the general issue, at the last April term in this county, before *Sedgwick*, J., and a verdict found that the defendant promised as alleged in the first count, and damages assessed at 240 dollars, 17 cents; and that the defendant promised as alleged

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in the sixth count, damages assessed at 24 dollars, 77 cents; and with regard to the other counts, that the defendant did not promise, &c.

* No question arose on the second, third, and fourth [* 15] counts of the declaration.

The defence made at the trial to the first count, was that the note was given without any consideration. On this point the evidence was, that the plaintiff and his wife, *Abigail*, were seised in fee, in her right, of a parcel of land; that the husband had, by letter of attorney, given his wife full power and authority to make and execute any deed or deeds of land which she might think needful; that the wife, after the execution of the letter of attorney, signed, sealed and delivered an instrument, purporting to convey in fee to the defendant the parcel of land before mentioned. The commencement of the instrument is in this form — "Know ye, that I, *Abigail Fowler*, of *Palmer*, &c., gentlewoman, and also as attorney to *John Fowler*, &c., in consideration of, &c., paid by *Daniel Shearer*, of *Palmer*, &c., have given and granted, and by these presents do give and grant," &c. The language of the remainder of the deed purports to be her conveyance, and her covenants. She covenants that she is the sole owner; has in herself good right to sell, and that she and her heirs will warrant, &c. Then the instrument concludes, "In witness whereof I have hereunto set my hand and seal this seventh day of August, A. D. 1805." There is then subscribed *Abigail Fowler* against her seal. The note declared on was given in consideration of the execution of this instrument. The defendant insisted, by his counsel, that nothing passed by the instrument, it being *ipso facto* void; and that the note was therefore given without any consideration. The judge instructed the jury that this deed, so given, was a sufficient consideration for the note, and to this direction the defendant excepted.

On the fifth count, evidence was given of several articles of goods sold by the plaintiff to the defendant; but if the evidence was sufficient to prove the sale and delivery, there was no evidence of the value or price being agreed; and thereupon the jury were instructed that the evidence given was not sufficient to support this count, because the price *or value of none of the said [* 16] articles had been agreed upon between the parties. The plaintiff excepted to this opinion of the judge; but before the cause came on to be argued, he withdrew his exception, being restored to his right of review.

On the sixth count the evidence was, that in the summer of the year 1805, a *Mr. Hamilton* employed the defendant, then an attorney of the Court of Common Pleas, to collect for him a promissory

note, on which was due from the plaintiff to Mr. *H.* between 24 and 25 dollars. The note was immediately put in suit; after which, and before the sitting of the court to which the writ was returnable, the plaintiff paid to the defendant, on account of that note, 20 dollars, which, however, was not endorsed upon the note. The action was entered, and judgment rendered for the whole amount apparently due. Several executions had been taken out by the defendant upon that judgment, and returned with the defendant's certificate endorsed, that they were unsatisfied; none of which were put into the hands of an officer. A *pluries* execution issued on said judgment, after the commencement of the present action. Very soon after the money was received of the plaintiff, by the defendant, before the commencement of this suit, and before the return day of the writ, in *Hamilton's* action against the plaintiff, it was paid over by the defendant to the creditor, *Hamilton*. The judge, upon these facts, instructed the jury to find a verdict upon this count for the plaintiff, for the sum paid by him as aforesaid, and that they might also add interest thereon, from the commencement of this action. Against this direction the defendant also excepted.

The action stood over on the exceptions to this term, and was now argued by *Bliss* for the plaintiff, and *Ashmun* for the defendant.

Ashmun, in support of the defendant's motion for a new trial, contended that the deed from *Abigail Fowler* to the plaintiff was a void conveyance, and passed nothing, and the deed being void, the note was void also, as being wholly without consideration.

[* 17] *It might admit of a question, whether, by the letter of attorney, the wife was authorized to convey any land, except such as her husband was seised of in his own right. But if she had authority to pass the land described in the deed, the authority should have been pursued, and the deed must have been the deed of the husband. It ought to have been in his name, and as his proper act. His name and seal should have been put to it, in order to pass his estate, as well as her own name and seal to pass her estate. But she, in fact, after naming herself the attorney of her husband, assumes to convey the estate in her own name; all the covenants are her own; and she executes the deed only for herself, and in her own name. (1)

The money demanded in the sixth count was actually paid over to *Hamilton*, the plaintiff's creditor, for whose use the defendant

(1) *Bac. Abr. Leases and Terms for years*, I. 10. — 9 Co. 76, *b. Combs's case*. — 1 Str. 705, *Frontin vs. Small*. — 2 L. Raym. 1418, S. C.

received it, before the commencement of the present suit. At that time the plaintiff could have no claim on the defendant. If he had a right to recover it back, such right existed against *Hamilton*, and not against the defendant. To maintain this demand against the latter, it ought to be made to appear, either that he intended to commit a fraud upon the plaintiff, of which there was no evidence, and which cannot legally be presumed; or that the plaintiff has suffered damage by the defendant's conduct, which is not pretended, and which is not in fact true.

Bliss, for the plaintiff, contended that the deed was sufficient to pass the husband's life estate in the land. It is true that the substitution should appear in the deed, but it is immaterial in what part of it that appears. Here the wife expressly declares, that she acts as attorney to her husband. The form of the words used ought not to invalidate the deed, where the authority is sufficient, and in this case the authority is not questioned. (2)

But if it should be yielded that this was not the deed of the husband, still we contend that it was the deed of the wife, and as such was valid, and furnished a sufficient consideration for the note. By the common law of this commonwealth, *a deed executed by a feme covert, with her husband, [* 18] passes her estate as amply as a fine in *England*. But if a fine be levied by a feme covert without her husband, it binds her and her heirs, if it be not avoided by the husband. (3)

In the present case, however, there is sufficient to prove the assent of the husband to the conveyance. The letter of attorney is evidence of it, and, indeed, the very bringing of the present action, for the consideration money, proves it, and would estop him from denying it.

Further, the plaintiff is well entitled to recover upon this note, though it should be determined that the conveyance was the deed neither of the husband nor of the wife. The defendant might lawfully make the note in this case for a mere paper writing, to which he might affix an imaginary value, and having, without any fraud or imposition being practised upon him, voluntarily made the note, he is bound by law to pay it.

The evidence given, in support of the sixth count, was sufficient to charge the defendant. He neglected to pay over the money to *Hamilton*, for whom he had received it; he recovered a judgment against the plaintiff, without deducting the money which had been paid, and he afterwards sued out several executions, for the whole

(2) 2 *East's Rep.* 142, *Wilkes & Al. vs. Back.*

(3) 1 *H. Black.* 341, *Compton vs. Collinson.*

of the original demand. This was evidence of a positive misappropriation of the money, and well entitles the plaintiff to recover it back with interest, agreeably to the direction of the judge sitting at the trial.

The opinion of the Court was afterwards delivered by

PARSONS, C. J. The first count is on a promissory note, dated August 7th, 1805, by which the defendant promised to pay to the plaintiff 200 dollars on demand. The defendant at the trial objected the want of a consideration. The judge was of opinion that a sufficient consideration was proved, and so instructed the jury, who found their verdict accordingly. To this direction the defendant excepted, and the validity of this exception is now to be [* 19] considered. * (Here the chief justice recapitulated the evidence from the report of the judge, who sat at the trial.)

At common law, the deed of a married woman is not merely voidable, but is absolutely void; and she may plead generally *non est factum*. But the husband may make his wife his attorney; and as his attorney she may execute a deed in his name, and may put his seal to it; and may, before a magistrate, acknowledge it to be her husband's deed. And he shall be bound by it as effectually as by a deed executed personally by himself. And if the deed in this case be the husband's deed, a freehold estate, in the land described in it, passed to the defendant; which is a sufficient consideration for the note.

But we are satisfied that it is not the deed of the husband. If an attorney has authority to convey lands, he must do it in the name of the principal. The conveyance must be the act of the principal, and not of the attorney; otherwise the conveyance is void. And it is not enough for the attorney, in the form of the conveyance, to declare that he does it as attorney; for he being in the place of the principal, it must be the act and deed of the principal, done and executed by the attorney in his name.

In the instrument given in evidence, the attorney states that, as well for herself as attorney for her husband, she makes the conveyance; but the covenants are in her own name, and she sets her own hand and seal. It, therefore, does not purport to be her husband's deed, but her own. And if the deed be not his, no estate of his passed by it.

However, if the deed be not void, so that any estate or interest of the wife's passed by it to the defendant, or he had any remedy on the covenants, the execution of it by the wife may be a sufficient consideration for the note to her husband.

Although, as has been remarked, the deed of a married woman is, *ipso facto*, void by the common law of *England*; yet there are

cases, founded on immemorial usage in this state, where a wife may bind herself by her own deed, which she cannot avoid.

* As estates have never in this state been conveyed by [* 20] fine, in which the wife might be examined, and by her consent be barred by the fine ; an ordinance of the colony of *Massachusetts Bay*, passed in 1641, secured the wife her dower, unless she had barred herself by her act or consent, signified in writing, under her hand, and acknowledged before some magistrate. As that ordinance expired with the first charter, the provincial legislature, by the statute of 9 *Will.* 3, c. 7, saved to the widow of any vendor, or mortgagor, her dower, who did not legally join with her husband in the sale or mortgage, or otherwise bar or exclude herself from her dower. When, therefore, the widow is not barred by a jointure, and does not join with her husband in the sale, she shall have her dower. The usual mode, by which a wife is joined, is by introducing her, in the close of the deed, as expressly relinquishing all claim to dower in the premises sold, and by her executing the deed with her husband. And it has been sometimes done by her separate deed, subsequent to her husband's sale, in which the sale is recited as a consideration, on which she relinquishes her claim to dower. The deed of a feme covert, thus executed to bar her claim to dower, is not voidable, but will bind her as to such claim. (a)

It has also been an immemorial usage in the sale of the wife's lands, that a deed of conveyance, executed by husband and wife, acknowledged and registered, shall pass the wife's lands, not only as to her husband, but as to her and her heirs. This usage was originally founded in necessity ; as it was often convenient for families to alienate the wife's land, and as a conveyance by fine was here unknown.

The late Judge *Trowbridge*, who was an excellent common lawyer, and of whose friendly assistance, in my early professional studies, I cherish the most grateful remembrance, attempted to derive or support this usage from the first section of the statute of *Will.* 3, before referred to, which authorized any person, having right to convey, to convey by deed executed, acknowledged, and registered. Now a feme *covert might lawfully convey [* 21] by joining with her husband in a fine, and therefore she might convey by joining with him in a deed.

One objection to this reasoning is, that according to the practical construction of the statute it proves too much. For tenant in tail can convey by common recovery ; yet it was never supposed that,

(a) [Quere, and see *Powell and Wife vs. The Monson and Brimfield Manufacturing Company*, 3 *Mason*, 347. — Ed.]

under this statute, he could convey so as to bar his issue, or those in remainder or reversion.

The celebrated Mr. *Reed*, the first lawyer in his time, resolved this usage into *New England* common law.

But whatever was the origin of the usage, it has prevailed without interruption beyond the memory of man; and it cannot now be disallowed, without shaking very many of the existing titles to real estate; and it must now be considered as the law of the land. If, therefore, the wife will voluntarily join with her husband in executing a conveyance of her land, she is bound by her deed, so far as it operates to pass her estate. (a)

She may be influenced or persuaded by her husband to execute the deed with him, knowing its effect as an alienation; but she may not know the nature or effect of the covenants contained in it. And to hold her liable on the covenants cannot be necessary to the conveyance, nor beneficial to her family; but may be greatly to her prejudice. The usage, therefore, has never extended to make her liable to an action on the covenants in the deed, further than they may operate by way of estoppel.

Neither has the usage ever extended to authorize her to convey any interest she has in lands, without her husband's joining in the deed of conveyance. Such an authority would be useless; for while her husband and she remained seised in her right, her deed, if it were not void, would pass no right or interest, unless by affecting her husband's rights, which she cannot lawfully do without his consent. And his consent must be manifested by his joining in the deed, either personally or by attorney. But her deed is [* 22] *ipso facto* void at common law, and is not supported by any usage. Therefore, no estate, right or interest, passed by it, and all the covenants contained in it are void.

If these positions are correct, and are applicable to the deed executed by the plaintiff's wife to the defendant, the inevitable conclusion is, that nothing passed by that deed to the defendant, and that he can have no benefit from any covenant contained in it.

What, then, is the consideration for the note declared on? Some consideration there must be, or it will be void as a *nudum pactum*, as between the parties. The only consideration pretended is this deed, executed by the plaintiff's wife to the defendant. A consideration, to be sufficient, must be either a benefit to one party or a damage to the other. The defendant could derive no benefit from this deed. Nothing could pass to him by virtue of it; and he

(a) [*Stearns vs. Swift*, 8 Pick. 532. — *Leavitt vs. Lamprey*, 13 Pick. 382. — Ed.]

FOWLER vs. SHEARER.

can never derive any advantage from any covenant contained in it. The plaintiff has suffered no damage by the deed. Neither he nor his wife has lost any thing by it. Neither is she answerable on any of her covenants, as the deed is, *ipso facto*, void. I do not, therefore, see any consideration sufficient to support this promise; and I am satisfied that the direction of the judge, on this point, was incorrect. If the defendant had paid the consideration money, and brought his action to recover back the money, as paid by mistake, a different question would have arisen, involving different considerations. But as this question is not before us, we give no opinion respecting it.

The sixth count is an *indebitatus assumpsit* for money had and received. The plaintiff, to make out his case, proved that owing a Mr. Hamilton about 25 dollars on a promissory note, the promisee had placed it for collection, or suit, in the hands of the defendant, then an attorney of the Common Pleas; that, after the writ was served, the plaintiff paid to the defendant, who then held the note, 20 dollars in part; that the defendant did not endorse this payment, but prosecuted the suit and recovered judgment for * the sum due on the note, without discounting the pay- [* 23] ment, which judgment remains in full force. The plaintiff, therefore, insists that the money being paid in trust, that it should be endorsed on the note; for this breach of trust he is entitled to recover it back.

The defence is, that the defendant, soon after the payment was made, paid the money over to his client, before the commencement of this action, and before his client recovered judgment against the plaintiff; that receiving the money as agent, and paying it over, he is not answerable.

The jury, however, agreeably to the judge's direction, found a verdict for the plaintiff; and against this direction, as erroneous in law, the defendant excepts.

It is a general rule, that when a man receives money as agent and pays it over to his principal, he is not afterwards answerable to the payor. if the money should have been paid by mistake, or if the principal should have no right to retain it. In such case the action should be brought against the principal.

But this rule ought not to avail the defendant in this case. The money was not paid by mistake; and Hamilton had a right, when he received it, to retain it, as it was then due.

When the defendant received the note, to collect or put in suit, as an attorney of the Court, he is not to be considered as a mere agent to receive the money; but also as having authority to discharge the plaintiff. When this money was paid to him, it was on

the trust that he would discharge the plaintiff, either by endorsing it, or by crediting it when he entered judgment; and it cannot be presumed that, notwithstanding this payment to the plaintiff's attorney in that suit, the defendant was expected to retain counsel, and call on the present defendant, as a witness, to prove this partial payment. When the defendant proceeded, and took judgment without deducting the payment, he was guilty of a breach of the trust reposed in him by the plaintiff; and for this breach he ought to refund the money to the plaintiff.

[* 24] * Indeed, the plaintiff has no other remedy. He can not reverse *Hamilton's* judgment; and an action does not lie against him for an error in assessing the damages. We are, therefore, satisfied that the direction of the judge was right, and that this malpractice and oppressive conduct of the defendant precludes him from all claim to a new trial on account of this direction. It may be supposed that the defendant, when he took judgment, was induced to suppress this payment, because then his judgment being for a less sum than £4, he might recover as costs no more than a fourth part of the amount of the damages, pursuant to the statute of 1786, c. 52, § 3. But the same section authorizes full costs, when, in the opinion of the court, the plaintiff had a reasonable expectation of recovering a larger sum. And in that case, when the action was commenced, the plaintiff had not only a reasonable expectation, but a legal ground to recover a greater sum. However that might be, the defendant ought not to have received of the plaintiff, in this case, the payment, unless he had intended to let him have the benefit of it when judgment should be entered. (a)

Were we disposed to question the judge's direction, it would be on another ground. He directed the jury to calculate interest on this payment from the date of the plaintiff's writ. But as *Hamilton's* judgment against the plaintiff carries interest, we think the jury might legally have calculated interest on the payment, from the time it was made to the time of the verdict.

We have given an opinion that the direction, respecting the first count, was erroneous. The clear intent of the parties was, that the defendant should have the land described in the deed of the plaintiff's wife; and that intent was not legally executed, through the inattention or ignorance of the scrivener. If, however, the plaintiff and his wife will make a good title to the defendant in fee, as justice will then be done to both parties, agreeably to their con-

(a) [*Roice vs. Smith*, 16 *Mass. Rep.* 306. — See vide *Loring vs. Mansfield*, 17 *Mass Rep.* 394. — Ed.]

tract, we shall be against disturbing the verdict; otherwise the defendant is entitled to a new trial.

* After the opinion of the Court was delivered, the [* 25] counsel for the defendant moved that he might be allowed his costs on those counts which had been decided in his favor.

But *the Court* overruled the motion, observing that this had never been practised. In this case the plaintiff must be considered the prevailing party.

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THEODORE ELY AND ANOTHER, Plaintiffs in Review, and
also Original Plaintiffs, *versus* JOSEPH FORWARD AND
ANOTHER.

An endorser of an original writ is a competent witness for the original plaintiffs, in the trial of the same action, by a writ of review.
The Court will not change an endorser of a writ without the consent of the defendant.

THIS action was *assumpsit*, and was tried at the last April term in this county, before *Sedgwick, J.* A verdict being found for the plaintiffs, the defendants filed exceptions, on which they moved for a new trial. The exceptions were to the admission of *Justin Ely, Esq.*, as a witness for the plaintiffs, when his admission was opposed by the defendants.

The witness was examined on the *voir dire*, and declared generally that he had no interest in the event of the suit; but on his examination it further appeared that he had endorsed the original writ in this case, and continued as endorser until this term, when, on motion therefor, the name of the said *Justin Ely* was erased, and the name of *Jonathan Dwight, jr. Esq.*, substituted in lieu thereof as endorser. The said *Justin* further declared, on his said oath, that he should indemnify the said *Jonathan* for such costs as he might be compelled to pay, in consequence of such endorsement; and that he expected to charge the amount of such payment to the plaintiffs, and to receive the same from them.

And now *Ashmun*, of counsel for the defendants, insisted that an endorser of a writ, being liable for the costs that may eventually be recovered by the defendant, was an incompetent witness. In *Ball vs. Bostock*, (1) *King, C. J.*, says, that "although there are many

(1) *Strange*, 575.

instances where a party shall be a witness, though he is concerned in the event of the cause; yet there never was a case of [* 26] allowing one *who had made himself liable to pay the costs in the action." And although in the present case Mr. *Ely* had, by erasing his name and substituting Mr. *Dwight's*, avoided his responsibility to the defendants, yet his interest was not the less implicated, since he had assumed to indemnify Mr. *Dwight*.

Hooker contended that the objection went only to the credibility of the witness; and he likened it to the case of a creditor, who has always an interest to increase the funds of his debtor; but this was never held an objection to his competency, although in many cases it would operate strongly against his credibility.

The opinion of the Court was afterwards delivered by

PARSONS, C. J. (after stating the facts from the judge's report.) The question in this case is, whether the witness was, in fact, interested in the event of this suit.

I will consider the case as if the witness had remained endorser of the original writ. On that writ a judgment has been rendered, which can be reversed, neither in whole nor in part, by the judgment on this writ. That judgment was for the defendants, and if 't be unsatisfied, they may cause it to be executed at their pleasure, or may maintain an action of debt upon it. If, by the judgment on the review, it appear that the former judgment was erroneous, the plaintiffs in review will have judgment to recover back the money erroneously recovered in the former suit. But if the former judgment was right, then the defendants, besides executing the former judgment, will now have judgment and execution for the costs of the review. Whatever, therefore, may be the event of this review, the witness has no interest in it. His liability on his endorsement remains undischarged. For as he did not endorse the writ of review, he is not answerable for any costs which the defendants may recover on this review; but only for the costs on the original writ which he did endorse. Whether, therefore, he still continued the endorser of the original writ, or whether his name was erased, and a new endorser substituted, is perfectly immaterial.

[* 27] *But it is said, he engaged to indemnify the new endorser. Now, the new endorser cannot be further answerable than the first endorser was; as, by standing in his place, he has assumed the same, and no other liability. But the liability of the endorser of the original writ cannot be affected by any judgment on this writ of review, which he did not endorse. We are therefore satisfied that the witness, by his endorsement of the original writ, could not gain or lose by the event of the suit on the writ of review.

It may be objected, that if the plaintiffs in review recovered, they may satisfy, out of their execution, the execution which issued for costs for the defendants in the original suit; and thus the endorser may be discharged from his liability, and so is interested in the event of this review. It is true that the endorser may be discharged; but he is entitled to an indemnity at all events from the plaintiffs; and whether he be saved harmless, or whether he be indemnified for the damages actually sustained, involves a question of consequential, and not of direct interest. And upon this principle a man may be a witness for his debtor, although if the debtor fail in such suit the debt may be lost, but may be paid if he prevail.

Indeed, the suit on the original writ, and the suit on a review, by the party who failed in the original suit, may be considered as cross actions between the same parties. And very clearly an endorser of the writ in one action, may be a witness for the party for whom he endorsed, when defendant in the cross suit; and yet it may be said that he is interested that the defendants in the cross suit should recover costs, to balance the costs which he may have to pay in the suit in which he is plaintiff, and for which the witness, as his endorser, may be liable.

We observe that, on motion, the first endorser's name was erased, and a new endorser substituted. This motion has frequently been made, and has as frequently been resisted by the Court. Every original writ must be endorsed, either by the plaintiff, or his attorney, before it be served. And *the endorser is [* 28] holden as security to the defendant for the costs he may recover in that suit. The defendant has, therefore, an interest in the security, of which the Court cannot deprive him without his consent.

Further, no remedy is given to the defendants against any endorser, but one who endorsed before the service of the writ, except when he moves for a new endorser, the former being insufficient, and the plaintiff living without the state.

It cannot be compared to the case of bail, who, to be made a witness, shall surrender the principal; because he may at any time surrender him at his own election; and if the plaintiff have the body of the defendant in custody, the bail has complied with his stipulation, and has discharged himself.

Upon the whole, we are satisfied that Mr. Ely was a witness competent to be sworn for the plaintiffs in this cause, and that a new trial ought not to be granted.

Judgment on the verdict.

 BLAKE vs. JONES & TRUSTEE.

 JOHN W. BLAKE *versus* HENRY W. JONES AND SAMUEL
TAGGART, his Trustee.

One summoned as a trustee of an absconding debtor cannot appear and plead for his principal, unless he have effects in his hands, on which the process may take effect.

Nor can he plead in his own name, except when he is personally injured by the process, as when he is the only person summoned as trustee, and is called to answer out of his county.

But a trustee having effects may, in the name of his principal, take any legal exception in abatement, as the want of a regular service on the principal.

In this case there was no service of the writ on *Jones*, the principal debtor. The supposed trustee pleaded in abatement, commencing his plea thus: "*And the said Samuel Taggart, who is summoned as trustee in said action, comes and defends,*" &c. He then praysoyer of the writ and return, which being read, he alleges that the principal, within three years before the writ was sued, was resident at *Adams*, within the commonwealth; and because an attested copy of the writ was not left at his last and usual place of abode, he prays judgment that the writ may be quashed. The plain-
[* 29] tiff, in his replication, traverses the residence of * the principal, concluding to the country. The supposed trustee joined the issue thus tendered, and on a trial thereof, before *Sedgwick, J.*, at the last April term in this county, a verdict was found against the plaintiff, subject to the opinion of the Court, on the facts reported by the judge.

The cause was argued upon the report, at this term, by *Mills* for the plaintiff, and by *Bliss* and *Newcomb* for the supposed trustee. In the course of the argument, it was suggested from the bench that the question was not regularly before the Court; and the opinion of the Court being afterwards delivered only as to the point so suggested, it is unnecessary to recite the arguments raised at the bar.

PARSONS, C. J. It is very clear, that to entitle any person summoned as trustee to appear and plead for the principal on his non-appearance, such person must have in his hands goods, effects, or credits, of the principal, on which the attachment shall take effect. This is the express provision of the statute. We are also satisfied that a person summoned as a trustee, who in fact has no effects, cannot plead this plea, or any plea in his own name, except where he is personally injured by the process; as when he is the only person summoned as trustee, and is called to answer out of his county. In the present case the supposed trustee is summoned to

BLAKE vs. JONES & TRUSTEE.

answer in his own county, and if he has no effects, he will be discharged, will have his costs, and the proceedings against the principal will cease; but if he has effects, he may then appear in the name of the principal, and take any legal exception in abatement, which the principal in his own name could take.

This plea might, therefore, be pleaded in the name of the principal, by a trustee having effects; for if the principal has not had the legal notice of the suit, to which he is by law entitled, he may appear and plead this want of notice in abatement. His appearance, for the express purpose of taking the exception, shall not be deemed a waiver of the ground of the exceptions. If, therefore, we were to consider this plea, by the supposed trustee, in his own name as regular, *and the issue be found against [* 30] him; then, on his examination, if he appear to be no trustee, he will be discharged; and, by a cessation of all further proceedings, every beneficial end to be obtained by abating the writ will follow.

We shall then, by allowing the plea, cause much time and cost to be fruitlessly expended, and unnecessary delay to be introduced. But if the party summoned be a trustee, then, if he appear for the principal, and plead any plea in abatement, which is found against him, the principal having appeared by his trustee, the cause may proceed, and be determined on its merits.

Agreeably to this reasoning has been the practice, so far as I have been acquainted with it. If the principal did not appear, the party summoned as trustee, having effects, might plead, in the name of the principal, any plea which the principal could plead; but in the commencement of his plea he not only stated that he was summoned as trustee, but also that he had in his hands goods, effects, and credits, of his principal. Where he had none, he was examined and discharged, and recovered his costs.

When he was personally injured, by the irregularity of the process, he might take the exception in his own name, for this injury will be the same to him, whether he be or be not in reality a trustee. But an irregularity or defect in the process, injurious only to the principal, must be taken advantage of only in his name.

In the plea in abatement, pleaded in this case by Mr. *Taggart*, he describes himself only as summoned, and not as being a trustee; and on this ground he cannot plead in the name of his principal. And as for the exception taken relating to a want of regular service on his principal, if he be not a trustee this defect is wholly immaterial to him; and if his object is to protect his principal, that object will be obtained on his discharge, for all further proceedings will then cease.

 BLAKE vs. JONES & TRUSTER.

The verdict in this case must be set aside; but we do not think that a new trial ought to be granted. We are, [* 31] *however, of opinion that a replender should be awarded, when Mr. Taggart, if he has effects, may plead to the merits in the name of his principal; if not, he may plead that he had no goods, effects, or credits, of the principal in his hands, and submit to an examination on oath.

If he refuse to replead, the plaintiff may waive his joinder in issue, and may demur.

 JOHN FOWLER AND WIFE versus DANIEL SHEARER

Practice.—In trespass *quare clausum fregit*, by husband and wife, for a trespass on the wife's land, after a verdict for the defendant, and before judgment the wife died, and the defendant had judgment for his costs against the husband.

TRESPASS for breaking and entering the close of the feme plaintiff. After a verdict at the last term for the defendant, the cause was continued on a question saved for the opinion of the whole Court. During the vacation the wife died. The defendant had leave to suggest the death on record, and to take judgment for his costs against the husband.

Bliss for the plaintiff.

Ashmun for the defendant. (a)

(a) [The husband, as administrator, may prosecute the suit. *Pattes vs. Harrington*, 11 Pick. 221.—Ed.]

 DANIEL SHEARER versus JOHN FOWLER.

When money is paid in consideration of a contract, which contract is void for a want of power in one of the parties, or for any cause other than fraud or illegality in the contract, the money so paid may be recovered back in an action for money had and received.

THE declaration, which was in case, contained four counts. The last count, upon which alone any question came before the Court, was for money had and received by the defendant for the plaintiff's use.

SHEARER vs. FOWLER.

At the trial of the action before *Sedgwick, J.*, at the last April term in this county, the plaintiff offered to prove, in support of his said count, that, in consideration of the deed made by *Abigail Fowler*, the defendant's wife, as the attorney of her husband, and in her own right, (which deed is described in the case of *Fowler vs. Shearer*, ante, page 14,) of certain premises, which the husband and wife held in her right; he, the plaintiff, paid to the defendant one hundred *and sixty dollars, and gave his [* 32] promissory note for two hundred dollars, to recover back which money so paid was the purpose of this count. The evidence was rejected by the judge, and for that cause the plaintiff moved for a new trial, and the action stood continued upon that motion to the present term.

Ashmun, of counsel for the plaintiff, considered this point as settled by the decision, in the action before referred to, wherein the present defendant was plaintiff, and the now plaintiff was defendant.

Bliss, for the defendant, thought this a different question, and so, he said, did the Court; for, in delivering the opinion of the Court, in that action, *the chief justice*, putting the supposition that "the defendant there had paid the consideration money, and brought his action to recover it back as paid by mistake," observes that "a different question would have arisen, involving different considerations."

Here the plaintiff voluntarily paid the money, and, although he was mistaken as to the legal effect of the deed for which he paid it, he has no right to reclaim it. It was a mere mistake of the law; all the facts of the case were as well known to him at the time the transaction took place, as they have been since.

Curia. The principles of law, applicable to this case, seem to be well settled. Whenever money is paid in consideration of a contract, which contract is void, for want of power in one of the parties, or for any cause other than fraud or illegality in the contract, natural justice dictates that the money so paid shall be refunded; and there is no principle of law to prevent the operation of so equitable a rule. Here the deed, for which the money demanded in this action was part of the consideration, has been adjudged void; and in that action a promissory note, which was another part of the consideration of the same deed, has been avoided as *nudum pactum*, because the deed failed. No cause can be assigned why the money, which was actually paid, should remain in the hands of the party, who *still holds [* 33] the property for which this money was paid. The evidence ought, therefore, to have been admitted. The verdict must be set aside, and a new trial granted.

EBENEZER MATTOON *versus* THOMAS KIDD AND ANOTHER.

A sheriff may lawfully take a bond from his deputy, conditioned to pay over one quarter part of *all fees* which he shall receive as a deputy sheriff.

THE plaintiff, as sheriff of the county of *Hampshire*, having appointed the defendant, *Thomas Kidd*, to be one of his deputies, took from him, and the other defendant, a bond, conditioned, among other things, that *Kidd* should pay over to him *one quarter part of all fees* which he should receive as a deputy sheriff. The present action was *debt* upon that bond.

The defendants, in a plea in bar, set forth the provision of the statute of 1795, c. 41, commonly called the fee bill, which declares that "no sheriff shall demand or receive from any of his deputies, more than at the rate of *twenty-five per cent.* on the amount of fees *for travel and service.*" And thereupon the defendants say that the writing obligatory declared on is void in law.

To this plea the plaintiff demurs generally, and the defendants join in demurrer.

Bliss, in support of the demurrer, contended that the statute was intended to limit the sheriff to a certain portion of some particular fees received by the deputy, *viz.* those for travel and service only; and that as to the other emoluments, as the poundage on executions, it was intended to leave the parties to contract as they pleased. The plea in bar, therefore, suggests nothing prohibited by the provision referred to in the statute.

Ashmun, for the defendants, argued that the statute confined the sheriff to the portion of the fees received by his deputy for *travel and service only*, and prohibited him from demanding or receiving any part of any other fees. And the reason might be that in the other cases, as of levying executions for instance, the personal responsibility of the deputy was such, that the whole of the fees given by law were not more than an indemnity. Another idea suggested, but apparently not much relied upon, was [* 34] that in common **parlance* a quarter part intended more than twenty-five per cent.; the former being supposed to mean twenty-five pounds of every hundred pounds received, and the latter twenty-five pounds of every hundred and twenty-five pounds received.

By the Court. The plea in bar, in this case, presents a question on the construction of the statute of 1795, c. 41, commonly known by the name of the fee bill. The clause in question provides "that no sheriff shall demand or receive, from any of his deputies, more

than at the rate of twenty-five per cent. on the amount of fees for travel and service." The defendants contend that the word *service* is to be taken strictly, as the service of a writ or other precept. If this is the true construction, then either the sheriff is to receive no part of other fees which may be received by his deputies; or else this restriction is to be confined to the two kinds of fees specified in the clause, and for every thing else he is at liberty to exact what he pleases of his deputies; either of which constructions would be unjust, and contrary to the manifest intentions of the legislature. There is no doubt that twenty-five per cent. upon all the fees was intended by this act. The doubt as to the different import of the two expressions used in the statute and the bond is not new; but there is no foundation for the distinction. One quarter part is perfectly synonymous with twenty-five per cent. The bond is legal, and the plea in bar is bad and insufficient.

RICHARD PENHALLOW *versus* ELIJAH DWIGHT.

An officer, having an execution against one, may lawfully enter the close of the debtor, and cut down, seize and sell, as personal estate, corn or other product of the soil there growing, when ripe and in a fit state to be gathered.

TRESPASS for breaking and entering the plaintiff's close, and cutting down and carrying away his corn there growing.

The parties submitted the cause to the determination of the Court upon an agreed statement of facts. The defendant, at the time when, &c., was a constable of *Belchertown*, *in [* 35] which the *locus in quo* was situated, and he entered the close, and cut and carried away the plaintiff's corn thereon growing, and then fully ripe and fit to be gathered; claiming authority so to do, by virtue of an execution to him directed, then in full force, and issued in due form of law, upon a judgment of the Court of Common Pleas, for the county of *Hampshire*, against the plaintiff, and in favor of one *Eldad Parsons*. The said corn being sold by the defendant at public auction, according to law, produced the sum of 22 dollars, 49 cents, which sum, after deducting his fees, and the expenses of gathering the corn, the defendant endorsed on the said execution. If the Court should be of opinion that the defendant had a right, by virtue of the authority aforesaid, to enter the said close, and cut and carry away the plaintiff's corn, in manner and

PENHALLOW vs. DWIGHT.

for the cause aforesaid, it was agreed that judgment should be rendered for the defendant for his costs; otherwise for the plaintiff, for 25 dollars damage, with his costs.

Alvord for the plaintiff.

Dickinson for the defendant.

Curia. As the defendant had the right, and indeed was obliged, by the duty of his office, to enter the close of the plaintiff, and to seize any personal property of the plaintiff, whereby he might satisfy the execution he then held against the plaintiff; the only question is, whether corn, then in a proper state to be gathered, but found standing, might lawfully be cut down and disposed of, to raise the money due upon the execution. And we have no doubt that corn, or any other product of the soil, raised annually, by labor and cultivation, is personal estate; and would go to the executor, and not to the heir, on the decease of the proprietor. It is therefore liable to be seized on execution, and may be sold as other personal estate.

An entry, for the purpose of taking unripe corn, or other produce which would yield nothing, but in fact be wasted and destroyed, by the very act of severing it from the soil, would not be protected by this decision.

Let the defendant have judgment for his costs. (a)

(a) [*Com. Dig. Execution*, (C. 4.) 1 *Salk.* 368. — *Whipple vs. Foots*, 2 *Johns. Rep.* 418. — *Hartwell vs. Bissell*, 17 *Johns. Rep.* 128. — *Ed.*]

CASES
ARGUED AND DETERMINED
IN THE
SUPREME JUDICIAL COURT,
IN THE
COUNTY OF WORCESTER, SEPTEMBER TERM, 1810.
AT WORCESTER.

PRESENT:

HON. THEOPHILUS PARSONS, CHIEF JUSTICE.
HON. THEODORE SEDGWICK, }
HON. SAMUEL SEWALL, } JUSTICES.
HON. ISAAC PARKER, }

ELIJAH GOODENOW *versus* JOHN E. TYLER.

A commission merchant, in *Boston*, sold goods consigned to him on three months' credit, taking in payment the purchaser's promissory note, payable to himself or order; the purchaser became bankrupt before the time of payment arrived, and no dividend was ever declared of his estate. It was held, that the factor was not answerable to his principal for the value of the goods sold.

In this action the plaintiff declares that, in consideration that he had deposited in the hands of the defendant three pipes of gin, of the value of 300 dollars, the defendant promised to return the same to him, or to sell the same for the most it would produce, and deliver him the value thereof in money on demand; that the defendant returned two pipes of the gin, and refused to return the third, or to pay the value thereof. There is also a count for money had and received.

The action was tried on the general issue, before *Sedgwick, J.*, at the last April term in this county. From the report of the judge it appears that the defendant, being a commission merchant in *Boston*, sold, as the factor of the plaintiff, a pipe of gin to one *Joseph Chapin*, and, in payment thereof, received the promissory note of *Chapin* for 81 dollars, 36 cents, payable to the defendant, or his order, in ninety days from the date. *Chapin* became a bankrupt before the time of payment arrived, and there has never been any dividend of his effects amongst his creditors.

[* 37] * At the time the gin was delivered by the plaintiff to the defendant, no particular orders were given, as to selling for cash or on credit. It was proved to be the custom in *Boston*, and particularly at the defendant's store, for factors to sell on credit, and at the risk of their principals, unless an additional premium was allowed for taking the risk upon themselves.

Upon this evidence, the judge directed a verdict for the plaintiff, for the amount of the gin sold, after deducting the defendant's commissions, and a small balance otherwise due to him; because the defendant had received from *Chapin* a negotiable note in payment.

Evidence was offered to show that, in cases where credit was given by a factor, it was customary to take promissory notes for the articles sold, which evidence was rejected.

The defendant moved for a new trial, on the ground of a misdirection of the judge in a matter of law; and the cause stood over to this term for the decision of that motion.

Bigelow, in support of the motion, cited 4 *Bac. Abr. Merchant, &c.*, B., that factors, where the commission is *to sell and dispose*, although they cannot give an unreasonable time for payment, as ten or twenty years, yet they may sell according to the usual time, for which credit is given for the commodities they dispose of. (1) In the case of *Drinkwater vs. Goodwin*, (2) Lord *Mansfield*, in delivering the opinion of the court, says that where a factor makes the buyer debtor to himself, he is not for that cause answerable for the debt. Although a negotiable note is, by our law, an extinguishment of the contract of sale, which it is not by the *English* common law; yet, as between principal and factor, the law is the same here as in *England*. A note payable in ninety days is an immediate discharge of the contract; and the factor, if chargeable at all, is therefore chargeable immediately on the sale. But we contend he is not chargeable at all, unless he sell the note, or appropriate [* 38] * it to his own benefit, or refuse to deliver it to his principal when required.

(1) *Buls.* 103(2) *Cowp.* 255.

Bigelow offered sundry depositions, taken since the trial; to prove the custom, in *Boston*, for factors to take promissory notes payable to themselves. But the Court declined hearing them.

Lincoln, for the plaintiff, contended that the defendant, having no special authority from the plaintiff to sell on credit, was chargeable for the value immediately upon the sale, as the negotiable note taken was payment; and an action for money had and received is the proper remedy. (3) A factor cannot sell even *bona peritura* upon credit, without a particular commission so to do. (4)

If the defendant had sold the goods on a credit generally, without taking the note in payment, the plaintiff would have had the control of the debt, and might have compelled payment to himself, or have prohibited payment by the purchaser to the defendant. But as the business was transacted here, the defendant placed the debt out of the power of the plaintiff. He should at least have taken a note payable to the plaintiff, so that *Chapin*, by paying the money to the plaintiff, might have exonerated himself.

PARKER, J. The plaintiff would insist that a factor, under the circumstances of this case, had no authority to trust the purchaser; and that having so done, he became immediately chargeable to the principal for the price. But the law merchant clearly contradicts this principle, it being well settled that a factor may sell upon credit, without taking upon himself the debt; unless he is restricted from so doing by the orders of his principal. And this principle is reasonable, and for the benefit of those who send their goods to market; for otherwise they would be frequently sold at a sacrifice, or remain unsold at the expense of the owner.

But even if this were not settled law, it is very clear that the usage of the market, where the goods are sold, would bind the owner; for he is presumed to be conversant of that * usage; and if he is silent in his directions to his factor, [* 39] as to the terms of the sale, he is considered as intending to be governed by the usage. Then if the factor had authority in this case to sell on credit, at the risk of his principal, there being no complaint of negligence, carelessness, or want of skill in making his bargain, either of which might have made him liable to the owner, notwithstanding his general authority; the question arises, whether the mode, in which the defendant gave the credit in this case, has fixed the debt upon him. A promissory negotiable note, payable to himself, was taken; and this is the point upon which the judge, at the trial, thought the liability of the defend

(3) *Barclay & Al. vs. Gooch*, 2 Esp. Rep. 571.

(4) 4 Bac. Abr. Merchant, B. cites 2 Mod. 100, and Buls. 101.

ant rested. But I do not see why this should change the nature of the case.

The relation between the principal and factor remains the same, as if the factor had taken a note not negotiable; or had charged the article sold in his book, and had made the purchaser debtor to himself; which he certainly might have done, keeping an account at the same time between himself and the principal. That the note was negotiable, was favorable to the principal, because it could easily be assigned by the factor to him. It is considered by the law as taken in trust for the principal; and if the factor should refuse to assign it on demand, doubtless he would be liable in an action by the principal.

It is said that a negotiable note, given for the amount of an account for goods sold, discharges the original contract. This is true, as settled in this commonwealth, between the vendor and vendee; but it surely does not follow, that because the factor has changed an account on his book into the more simple and convenient evidence of debt, a note of hand, that for this cause only, he has burdened himself with a debt for which he received no consideration.

I am, therefore, of opinion that there ought to be a new trial.

SEWALL, J. If I was satisfied that, upon established principles, a factor who sells the goods of his principal upon [* 40] * credit, and receives a promissory note for the amount of the sales, payable to himself and negotiable, became thereby immediately accountable, as if he had sold for money, I should think a new trial ought not to be granted. But I am not satisfied that this is the law. I think the rule in this respect must depend upon the particular usages of commission merchants, and that the law upon this subject, as to the authority of the factor, and the extent of his liability, is referable to known and established usages; where the parties rely altogether upon the general relation and implied duty of a merchant and factor, no directions or agreement having been expressed between them, or proved in the case.

I think usage is competent evidence, in a case of this nature, to show the implied intentions and understanding of the parties. As evidence to the effect of proving a usage of selling upon credit, and of taking negotiable promissory notes, payable to the commission merchant, was offered in this case and rejected at the trial, I think there ought to be a new trial; leaving it for the present undetermined how far the usage will justify the conduct of the defendant in the case at bar.

It is very certain that no usage can justify the defendant in any

wilful negligence in securing the property of his principal. And if his conduct has been such as to show that he had received and treated the note, given for the gin, as his own demand, he may be liable; notwithstanding a usage to sell upon credit, and to take notes in payment, should be fully proved.

SEDGWICK, J. The question is, whether a promissory negotiable note, taken by a commission merchant, payable to himself, in payment for goods sold for his principal, at the time of the sale, the custom of the place authorizing a sale upon credit, without express authority from the principal, is at the risk of the principal or of the factor.

I have no doubt that the evidence of selling upon credit, where no particular instructions were given, was properly *admitted. But evidence offered to prove that, in cases [* 41] where credit was given by a factor, it was customary to take promissory negotiable notes, payable to the factor, was rejected, because it was deemed inadmissible. Perhaps it might be proper that a unanimous opposing opinion of all the other members of the Court should induce such a modest diffidence of my own judgment, as would lead me silently to acquiesce. But of the opinion which I delivered at the trial I had then very little doubt; and I confess that neither my own reflections, nor what I have heard since, have entirely altered the view which I then had of the subject. Under these circumstances it is my duty to declare, and I shall do it as concisely as possible, the reasons on which my opinion was founded.

We know that a promissory note, given and received for goods at the time of a sale of them, is payment as much and as effectual, to all intents and purposes, as cash. Now in this case, at the time of the sale, the defendant took a promissory note in his own name; and of consequence then received payment, as much so as if he had received cash. He did not leave it in the power of the plaintiff to resort to *Chapin*, the vendee, but he was compelled to look only to the defendant. The note which was thus taken, and which gave evidence of a contract between the defendant and *Chapin*, to the exclusion of the plaintiff, was negotiable, or, in other words, the very form, as well as nature of it, was currency; as much circulating medium as a bank note; of such nature, that a previously existing parole contract, as the law is here understood, would have been merged by it, as completely as it would have been by a bond, recognizance, or deed of any kind. Now, can it be believed that if the defendant had taken a bond, or other deed, in payment for the goods sold, the sufficiency of the debtor would have been at the risk of the plaintiff? No more, in my opinion, than if the defendant had taken

a conveyance of real estate in payment. It seems to me, [* 42] that in such a case the factor * must be considered as assuming the risk of the responsibility of the vendee.

It is in general undoubtedly true, where a factor sells the goods of his principal on credit, that on non-payment, according to the contract, an action may be supported against the vendee in the name of the principal. The principal has, in such case, a double security, the fidelity of the factor and the sufficiency of the debtor. But if he is deprived of the latter, the sufficiency of the debtor, by the act of the factor, as in this case, by taking a promissory note in payment, it seems to me reasonable that he should have direct recourse to his factor.

It is said, that the factor is bound to permit, in such a case as this, the principal to make use of his name in commencing an action upon the note. But suppose he will not; the principal is then deprived of any remedy against the debtor; which, instead of being an absolute right in the principal, and available at his pleasure, is made to depend on the will of the factor. The factor may also assign the note, or he may die, become insolvent, or a bankrupt, and thereby the remedy, which ought to exist against the debtor, for the security of the principal, be wholly lost.

The principle contended for, in the defence of this action, is not supported by any rule of commercial law laid down, or even suggested, by any approved authority. It is attempted only to be supported by the custom of commission merchants in *Boston*. For my self, I am not disposed to authorize any description of merchants to alter the known principles of law, in cases materially affecting the important interests of others, as this would do, by depriving principals of the means of looking immediately to their debtors, made such by their contracts with factors. It is not like the custom of notice, established by the banks in this state, and which has been approved by the Court, of demanding the money due upon negotiated notes of the makers, when they fall due, according to the terms of them, without an allowance for the days of grace, and

[* 43] afterwards, at the end * of those days, giving notice to the endorsers. This is undoubtedly an alteration of what was previously the law, in respect to notice; but it is an alteration only of the *manner and form*, and does not affect, as this supposed custom does, the *substance*, by depriving the principal of an immediate remedy against a debtor who justly owes him.

I know that it may be said, in this case, that as *Chapin* became a bankrupt before the note became due, and as he had no estate from which a dividend could be made, it is impossible that the plaintiff should be a loser. But to this it may be answered, that in establish-

ing general principles, care should be taken to look at their consequences in all respects; and although there may be cases, in which no injury would result, yet if certain mischiefs could, in other cases, be foreseen, an approbation ought to be withheld. But there is no certainty that there may not, even in this case, have been a loss to the plaintiff; for if, by being the creditor of *Chapin*, he might have taken an active part in the proceedings against him under the commission of bankruptcy, it cannot with certainty be known but that property enough might have been found to satisfy, in whole or in part, the debts of *Chapin*. At any rate, it was a chance, of which the conduct of the defendant has unduly deprived him. But however this may be, yet in the cases which have been mentioned, of an assignment of the note by the factor, of his insolvency or bankruptcy, the principal will be liable for losses, which might be avoided by the rule which I have always supposed governed such cases.

But even if the custom, on which the defendant relied, could in any case be supported, it seems to me to be necessary for that purpose, that it should have been made known to the plaintiff. This is not pretended to be the case. The defendant was authorized, by implication, to sell on credit; but in this case, as respected the plaintiff, he did not sell on credit; for the note that was given was payment; on which, and which alone, could an action be supported for the value of the goods. A note too, which, to *many purposes, and to all which have any relation to [* 44] the case before us, has the properties of money; over which the defendant had absolute control, and over which the plaintiff had none

I am much opposed to innovations, by the establishment of new rules, affecting the rights of property. They are generally intended to conform to an existing state of things, or the equity of a particular case; but there has hardly been an instance, in which they have not been productive of mischief. Until now I have never heard it suggested that any such custom, as that offered to be proved, existed any where; but surely it ought not to conclude the plaintiff, without being made known to him. As I thus continue of the opinion I held at the trial, and as the verdict of the jury was conforming to that opinion, I am not for sending the cause to a new trial.

PARSONS, C. J., stated the nature of the action, and the substance of the judge's report, and proceeded:—Without considering how far the evidence comports with the declaration, which point is not before us on the report, I shall confine my opinion to the direction of the judge.

The Court will take notice, as a part of the law merchant, that a factor may sell goods at a reasonable credit, at the risk of his prin-

cial, when he is not restrained by his instructions, nor by the usage of the trade. He is not, however, authorized to give credit to any but persons in good credit, and whom prudent people would trust with their own goods. If, through carelessness, want of reasonable inquiry, he sell on credit to a man not in good credit, and there be a loss, the factor must bear it.

When a factor sells on credit, he may take from the purchaser some instrument, by which the purchase may appear, with the price and the time of payment, and on which the purchaser may be charged in an action at law. And it is very clear that he is not obliged to disclose to the purchaser the name of his principal, or even to state to him that he sells as factor. Upon these [* 45] principles he may take a * promissory note payable to himself; and when the principal lives in a foreign country, it may be most convenient for him to have the security payable to himself, so that he may sue it in his own name.

When the security is in the name of the factor, he holds it in trust for his principal. If the principal demand it, offering to pay the commission, and the factor refuse to assign it, he then becomes answerable for the money. So if the money be lost by his negligence, in not seasonably demanding it, the factor is responsible for his negligence. Upon these principles it seems very clear, that in this case, if the defendant had taken a note to himself not negotiable, to secure the payment of the money, he would have been a trustee of such note for the plaintiff; and if the money could not be recovered, without any laches on the part of the defendant, he would, in law, be discharged.

But, in this case, the defendant took as security a negotiable note in his own name. And it is said that such note is payment, by which the purchaser is discharged from the principal; and, consequently, that the defendant assumed the debt on himself, and is at all events answerable.

It must be admitted that in this state it has been settled by a series of decisions, which can be traced back sixty years, that where a negotiable note is given to secure the payment of money due by a simple contract, the simple contract is holden to be satisfied, or merged in the note; lest the debtor, on the simple contract, should be holden to pay it to the creditor, and afterwards, as promisor of the note, be holden to pay its contents to an innocent endorsee. But the discharge of the debt, due by the simple contract, is the consideration for the negotiable note. (a)

(a) [See *Reed vs. Upton*, 10 Pick. 525. — *Jones vs. Kennedy*, 11 Pick. 131. — *Wulkins vs. Hill*, 8 Pick. 522; where it is held to be only presumptive evidence of pay

When a factor shall receive a negotiable note, in payment for goods sold on commission, as the consideration arises from the sale of his principal's goods, the note may be holden in trust for the principal. But if it be so holden in trust, and the principal demand the note, offering to pay the commission, and the factor refuse to assign it, without *a right of recurring to him- [* 46] self, this is a breach of his trust which will make him answerable. He is also answerable if he negotiate the note for his own use, or if the money be lost by his neglect of demanding it of the parties to the note.

Although a negotiable note may change the remedy against the purchaser on credit, if he fail to pay, yet the relation between the principal and factor may not be affected. If the law, or the usage, were not so, the disadvantages to the principal would be great. No factor would ever take a negotiable note, as security in his own name, unless for an extra commission as guarantying the payment.

By taking such a negotiable note, the principal is not obliged to wait for his money until due; but the factor may immediately discount the note and receive the money. But when the principal lives abroad, such discount is impracticable, unless by sending the note and having it returned endorsed by him. Another great benefit of a negotiable note, in the name of the factor, is, that he may, on the credit of it, make advances to his principal, which is often desired before the money is due. And the advances are easily procured by the factor's discounting the note. But if the note is in the name of the principal, the factor cannot, on the credit of it, make any advances to his principal.

For these reasons I am satisfied that the principle holden by our courts, that a negotiable note is a bar to an action on the simple contract, which is the consideration of the note, does not necessarily and absolutely affect the relation between a factor and his principal, as to the authority of the former to take a negotiable note, in his own name, in trust for the latter.

Whether, in deciding this point, we can judicially take notice of the usage in *Boston*, to which place the plaintiff sent his goods to be sold on commission, may be questioned. But a general usage in any place, by which sales on commission are regulated, may be

ment, which may be rebutted. The reason given by the chief justice does not seem to be satisfactory. It is all that the debtor can reasonably require, when sued upon simple contract, if judgment be suspended until the note, given for the same consideration, is produced and cancelled. — *Raymond vs. Merchant*, 3 Cowen, 147. — *Hughes vs. Wheeler*, 8 Cowen, 77. — In fact, the doctrine in the text does not very well accord with the decisions repeatedly made, that a promissory note may be given and received in evidence, to support a count for money paid or money lent. — *Ev.*]

given in evidence. For it is a reasonable and legal presumption, that every man * knows the usage of the place in which he traffics, whether by himself or his factor, and if the usage be not illegal, he is bound by it. If, then, it be the well-known and uniform usage in *Boston* for the factor to take negotiable notes, in his own name, as a security for the payment for the goods of his principal sold on credit, but in trust for his principal, such usage must bind the principal, unless he give his factor instructions repugnant to it, and such usage may be proved to a jury. Now, I am satisfied that such is the usage in *Boston*, and believe in every commercial city in the *United States*, where goods are sold by factors on commission.

In applying these observations to the case before us, there seems to be no imputation in the report, whatever may appear to be the case on another trial, of laches in the defendant, in selling the plaintiff's gin on credit to *Chapin*, nor in collecting the money. *Chapin* failed before the money was payable. But the defendant took, as security from *Chapin*, his negotiable note payable to himself or his order. It is not pretended that the defendant was to guaranty *Chapin's* payment, or that he had any commission on that account. The only point is, whether the defendant, by receiving from *Chapin* his note payable to himself, or his order, made himself liable, in all events, to the plaintiff, for the payment of the money due on the note.

My present opinion is, that on general principles of the law merchant, independent of any usage in *Boston*, the defendant did not make himself thus liable; but if there be any doubt as to these general principles, evidence of the general and uniform usage in *Boston*, where the plaintiff sent his goods for sale on commission, that the factor takes negotiable notes for payment in his own name, but in trust for the principal, may be legally given in evidence.

Upon these grounds I am satisfied that the verdict ought to be set aside, and a new trial granted.

Per Curiam. New trial ordered.

MILFORD vs. WORCESTER.

* THE INHABITANTS OF THE TOWN OF MILFORD *versus*
THE INHABITANTS OF THE TOWN OF WORCESTER.

It is a substantial compliance with the statute for regulating marriages for the parties themselves, to make the mutual agreements in the presence of a justice of the peace, or a minister, with his assent, he undertaking to act on the occasion in his official capacity.

But if the justice, or minister, does not consent to act in his official character, the marriage is void; the woman cannot claim her dower, nor the issue inherit by descent.

The same law is of a marriage contracted by the parties themselves before any witnesses whatever, unless a minister, or justice, be present, consenting to act in their official character.

A marriage solemnized by a minister, or justice, between parties who may lawfully marry, although without publication of bans, and without the consent of parents or guardians, is valid, although the officer incurs a penalty for a breach of his duty.

A record of a marriage solemnized by a minister, or justice, founded on a certificate, duly made, is legal evidence of the marriage; and no inquiry is made as to the publication of the bans, the consent of parents or guardians, or the inhabitancy of the parties.

THIS was an action of *assumpsit* for the support and relief of *Stephen Temple*, *Rhoda Temple*, alleged by the plaintiffs to be the wife of the said *Stephen*, and their six children, being paupers, whom the plaintiffs aver to have their legal settlement in *Worcester*.

The action was tried upon the general issue, at the sittings after the last September term, in this county, before *Sewall, J.*

The report of the judge states, that "the parties agreed to the items of the account, and to the sums charged for the same; subject only to the question of the settlement of the paupers; that due notice had been given by the town of *Milford*, which had been replied to seasonably, as the law requires, by the defendants; and, upon the question of settlement, it was agreed that the said *Stephen Temple* had his legal settlement in *Worcester*; and that the said *Rhoda* and the six children had their legal settlement there also, if she was the lawful wife of the said *Stephen*; but if not, that then the town of *Worcester* is liable for the expense of supporting *Stephen Temple* only."

"The evidence of a marriage between the said *Stephen* and *Rhoda* was a certificate, by the town clerk of *Upton*, in the county of *Worcester*, that, in the book kept for that purpose, there is an entry, July 6, 1784, of the intentions of marriage of *Stephen Temple* and *Rhoda Essling*; and by the deposition of the said *Rhoda*, and the testimony of other witnesses, it appeared that, in the year 1784, and several years before, the said *Stephen* and the said *Rhoda*, then *Rhoda Essling*, were residents in *Upton*, and some time in

[* 49] *that year they came together to a tavern in *Upton*, when — *Dorr*, Esq., then a justice of the peace for the county of *Worcester*, happened to be there; and producing a certificate, that their intentions of marriage had been published, requested him to marry them; but he, after some inquiry into the cause of the application to him, refused "to take an active part," as the witnesses expressed it. The said *Stephen* and *Rhoda* continued notwithstanding in the room where the said *Dorr* was, and there in his presence, and before several other witnesses, the said *Stephen* declared that he took the said *Rhoda* as his lawful wife; and she declared that she took him as her lawful husband; and each made to the other the vows and promises usual in contracting marriages. According to some of the testimony offered for the plaintiffs, this proceeding was directed and encouraged by the said *Dorr*. But this part of the testimony was contradicted by the deposition of *Dorr*; and the judge left it to the jury to decide upon the whole evidence, whether the proceedings had the sanction, in any degree, of the said *Dorr*, acting as a magistrate; with directions to find for the plaintiffs the amount of their account, including the support of the woman and her children, if the consent of the said *Dorr* to be present as a magistrate had been proved; and otherwise to find the amount due for the relief of *Stephen Temple* only."

The jury found for the plaintiffs the amount due for the relief of the said *Stephen*, and no more. The verdict was taken, subject to the opinion of the Court, upon the evidence reported, whether there was proof of a lawful marriage, &c.

And now, at this term, *Hastings*, of counsel for the plaintiffs, moved for a new trial; observing that the only question in the action was upon the validity of the marriage of these paupers.

This was a marriage *de facto*, and sufficient to give to the wife and children a derivative settlement. A contract in *præ-*
[* 50] *senti*, as *I marry you, you and I are man and wife*, * &c., by the civil law, amounts to an actual marriage; which the very parties themselves cannot dissolve by release, or other mutual agreement; and is as much a marriage in the sight of Heaven, as if attended with the most solemn formalities. (1) It is said by Lord *Kenyon*, in the case of *Read vs. Passer*, (2) that evidence from cohabitation, reception from the party's family as man and wife, was under every circumstance admissible, and *primâ facie* evidence of marriage, to go to a jury. And in the case of *Leader vs.*

(1) *Bac. Abr. Marriage, &c., B.*, cites *Swinb. 74*, 2 *Salk. 432*.

(2) 1 *Esp. Rep. 213*.

MILFORD vs. WORCESTER.

Barry, (3) his lordship says that in every civil case, except in an action for criminal conversation, general reputation, the acknowledgment of the parties, and reception of their friends, &c., as man and wife, was *sufficient* proof of coverture.

In the case of *Morris vs. Miller*, (4) Lord *Mansfield*, in delivering the opinion of the court, says that in that kind of action, which was for criminal conversation, there must be evidence of a marriage in fact; acknowledgment, cohabitation, and reputation, are not sufficient to maintain *this* action; plainly implying his opinion that in other cases such evidence would be sufficient.

The consent of the parties is the essence of the marriage contract; and such a marriage as this was, would legitimate the issue, and entitle the wife to her dower. It ought not then to be invalidated in an action between other parties, and upon a subject merely collateral.

By our statute of 1785, c. 86, for regulating marriage and divorce, marriages within the degrees prohibited, and where either of the parties have a former husband or wife living, are expressly declared to be null and void. So, also, the statute of 1786, c. 3, for the orderly solemnization of marriages, prohibits the marriage of a white person with any negro, Indian, or mulatto, and declares all such marriages to be null and void. But as to other marriages, it prescribes for the publishment of the bans, authorizes ministers and justices to solemnize marriages, and provides severe penalties in case of their solemnizing marriages *otherwise [* 51] than the act allows; but it does not declare the marriages void, as in the other cases mentioned. The inference is very strong, that the marriages are to be considered valid, although in favor of the public morals and decorum, the officer acting in them is punished. But here every requisition of the statute had been complied with, and upon the magistrate's unlawfully refusing to officiate, they contracted in his presence, and have fulfilled the contract by cohabiting for more than twenty years.

Bangs and *Lincoln*, of counsel for the defendants, were stopped by the Court, whose opinion was afterwards delivered by

PARSONS, C. J. This action is *assumpsit*, for the maintenance of *Stephen Temple*, *Rhoda Temple*, said to be his wife, and their six children, who, as the plaintiffs allege, are paupers, having their settlement in *Worcester*. The cause has been tried upon the general issue, and a verdict found for the plaintiffs, as to the maintenance of *Stephen Temple*; but against them, as to the maintenance of *Rhoda* and the six children. The plaintiffs move for a new trial

(3) 1 *Esp. Rep.* 353.(4) 4 *Burr.* 2059

upon the judge's report, in which it is not stated whether the objection is to the judge's direction, or to the verdict as against evidence.

From the report it appears to have been admitted, by the parties, that *Stephen Temple's* settlement was in *Worcester*, and that the jury did right in charging that town with his support. If *Rhoda* was his lawful wife, the six children would be legitimate, and she, with her children, will have a derivative settlement in *Worcester*, with her husband and their father. The legality of the marriage between *Stephen* and *Rhoda* was, therefore, the only question between the parties. If this marriage is established, then the verdict must be set aside, and a new trial granted, that *Milford* may recover the money expended in maintaining the wife and the six children; otherwise the verdict is to stand.

(After stating the facts reported by the judge, his honor proceeded.)

[* 52] * On this evidence, the judge left it to the jury to decide, whether or not these proceedings had the sanction of the justice, as a magistrate; if not, to find against the marriage, if otherwise, to find in favor of it. As the cause was thus left to the jury, there is no ground to declare the verdict to be against evidence. Although some of the witnesses testified that the proceedings between *Stephen* and *Rhoda* were directed and encouraged by the justice, yet he, on his oath, denied it; and the jury were the proper judges of the credibility of the witnesses, and of the weight of their evidence. There was evidence on both sides, and they decided against the marriage. If the direction of the judge was right, there seems to be no reason to impeach the verdict. He directed the jury to find against the marriage, if the proceedings in the presence of the justice had not in any degree his official sanction. And the propriety of this direction is questioned.

Marriage is unquestionably a civil contract, founded in the social nature of man, and intended to regulate, chasten, and refine, the intercourse between the sexes; and to multiply, preserve, and improve the species. It is an engagement, by which a single man and a single woman, of sufficient discretion, take each other for husband and wife. From the nature of the contract, it exists during the lives of the two parties, unless dissolved for causes which defeat the object of marriage, or from relations imposing duties repugnant to matrimonial rights and obligations.

Marriage, being essential to the peace and harmony, and to the virtues and improvements of civil society, it has been, in all well-regulated governments, among the first attentions of the civil magistrate to regulate marriages; by defining the characters and rela-

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tions of parties who may marry, so as to prevent a conflict of duties, and to preserve the purity of families; by describing the solemnities, by which the contract shall be executed, so as to guard against fraud, surprise, and seduction; by annexing civil rights to the parties and their issue, to encourage marriage, and to

*discountenance wanton and lascivious cohabitation, [* 53] which, if not checked, is followed by prostration of morals, and a dissolution of manners; and by declaring the causes, and the judicature for rescinding the contract, when the conduct of either party and the interest of the state authorize a dissolution. A marriage contracted by parties authorized by law to contract, and solemnized in the manner prescribed by law, is a lawful marriage, and to no other marriage are incident the rights and privileges secured to husband and wife, and to the issue of the marriage

The inquiry, therefore, in this case is, whether the mutual engagement of *Stephen Temple* and *Rhoda Essling*, made at the tavern in *Upton*, under the circumstances there existing, was a lawful marriage. Let us now examine the law.

When our ancestors left *England*, and ever since, it is well known that a lawful marriage there must be celebrated before a clergyman in orders, and that all questions of marriage, divorce, and alimony, regularly belong to the ordinary. When our ancestors first settled here, smarting under the arbitrary censures of the ecclesiastical courts, they were not disposed to invest their own clergy with any civil powers whatever; but to leave them wholly to the exercise of their pastoral functions. With this impression, in 1646, by an ordinance passed for the due solemnization of marriages, no person is authorized to join together in marriage any persons, but a magistrate, or some other person to be appointed in such places where no magistrate was near. And all persons were forbidden to join themselves in marriage but before some magistrate, or other person authorized as aforesaid. Neither was the magistrate authorized to permit the parties to contract marriage in his presence, unless the intention of marriage had been previously published.

Thus stood the law, until the repeal of the first charter. Under the provincial charter, new and different regulations, for the solemnizing of marriages, were made; which were in force in 1784, and by which the case before us must be governed.

* By the provincial statute of 4 *Will. & Mar. c. 10*, [* 54] every justice of the peace within his county, and every settled minister in any town, are authorized to solemnize marriages between persons who may lawfully intermarry, and who have the consent of those, under whose immediate government they are, producing a certificate of the publication of the intention of mar

riage. This statute containing no negative words, it was afterwards enacted, by the statute of 7 *Will.* 3, c. 6, that no person, other than a justice of the peace, and that within his county only, or ordained minister, and that only in the town where he was settled, should join any persons in marriage; nor any, unless one or both of the parties were inhabitants, or residents, in such a county or town respectively; nor without certificate of publishment; nor without evident signification that the parents, or guardians, were knowing of, and consenting to, such marriage, on the penalty of forfeiting *fifty pounds* to the county. The authority of an ordained minister, to solemnize marriages, was afterwards, by the statute of 3 *G.* 3, c. 4; and 13 *G.* 3, c. 6, enlarged in some special cases, which it is not necessary now to mention. These statutes remained in force until January, 1787; when the statute of 1786, c. 3, came into operation.

No form of words is established for the solemnization of a marriage. The usage is, for the justice or minister to require of the parties respectively an assent to a mutual agreement to take each other for husband and wife; after which he pronounces them to be husband and wife. But the statute would be substantially conformed to, if the parties were to make the mutual engagement in the presence of the justice, or minister, with his assent, he undertaking to act on that occasion in his official character. But without such assent and undertaking of the justice or minister, notwithstanding their personal presence, the marriage, I am well satisfied, will not be solemnized pursuant to, nor be a lawful marriage within, the statute.

When a justice, or minister, shall solemnize a marriage [* 55] *between parties, who may lawfully marry, although without publication of the bans of marriage, and without the consent of the parents or guardians, such marriage would unquestionably be lawful, although the officer would incur the penalty of fifty pounds for a breach of his duty. If, therefore, a mutual engagement of marriage made by the parties, in the presence of a justice or minister, he not assenting to act in his official character on that occasion, would be a solemnization of the marriage by him, it would be equally so whether the intention of marriage had or had not been published; and if it had not, he might incur the penalty of fifty pounds, where he had been guilty of no breach of official duty. This consequence is not to be admitted; and the necessary inference is, that such marriage engagement, so made by the parties, in the presence of a justice or minister, not consenting to act officially on the occasion, is not a lawful marriage pursuant to the statute.

But it has been argued that this marriage, although not solemnized pursuant to the statute, is yet a lawful marriage, had between parties competent to contract marriage, and not declared void by any statute.

This ground, for supporting the marriage, deserves consideration; as, if it be tenable, the consequences are very extensive. Where the laws of any state have prescribed no regulations for the celebration of marriages, a mutual engagement to intermarry, by parties competent to make such contract, would, in a moral view, be a good marriage, and would impugn no law of the state. But when civil government has established regulations for the due celebration of marriages, it is the duty, as well as the interest, of all the citizens to conform to such regulations. A deviation from them may tend to introduce fraud and surprise in the contract; or by a celebration without witnesses, the vilest seduction may be practised under the pretext of matrimony. When, therefore, the statute enacts that no person but a justice, or a minister, shall solemnize a marriage, and that only in certain cases, the parties are themselves prohibited from *solemnizing their own marriages by any [* 56] form of engagement, or in the presence of any witnesses whatever.

If this be not a reasonable inference, fruitless are all the precautions of the legislature. In vain do the laws require a previous publication of the bans, or the assent of the parents or guardians of young minors, or prohibit a justice or minister from solemnizing the marriage without these pre-requisites. A young and inconsiderate couple may, at a tavern or elsewhere, with or without the presence of witnesses, rush into matrimony, distress their friends, and destroy their own future prospects in life.

As the notoriety of marriages is of importance to the people, in furnishing an easy method of proving descents, the statute of 1786, c. 3, requires a certificate of a justice, or minister, of every marriage by him solemnized, to be entered on a public record, which cannot be impeached unless by evidence of fraud. Marriages otherwise solemnized cannot, therefore, be recorded, and cannot be presumed to be marriages recognized by law.

It has been truly observed, by the counsel for the plaintiffs, that a marriage engagement of this kind is not declared void by any statute. But we cannot thence conclude that it is recognized as valid, unless we render in a great measure nugatory all the statute regulations on this subject.

It may be objected to these principles, that if they are correct, a marriage among Quakers, agreeably to the rules of their society, is void. I know not that the conclusion would not be just. I know

that such was the opinion of lawyers before the revolution; and so general was this impression, that to guard those people from consequences so mischievous, in the eighth section of the revising statute of 1786, c. 3, all such marriages before had were confirmed, and such marriages authorized in future.

Marriages may be considered as void or valid, with respect either to civil rights incident to marriages, or to penal consequences to the parties, where marriages are questioned. Whatever [* 57] foundation for the distinction there may be, * when the parties might have lawfully intermarried, there can be none where the parties are prohibited from marrying. This last case comprehends, by our laws, incestuous marriages, (5) marriages within the age of consent, (6) when either of the parties has a husband or wife living, (7) and marriages between a white person and an Indian, negro, or mulatto. (8)

Marriages between parties, who might lawfully have intermarried, deserve a further consideration. No person can lawfully solemnize such marriages, but a justice of the peace, or an ordained minister. And a record of a marriage so solemnized, by either of those officers, founded on a certificate duly made, is legal evidence of the marriage, and no inquiry is further made as to the publication of bans, the assent of parents or guardians, or the inhabitancy of the parties. When, therefore, the marriage appears to have been celebrated by a competent officer, as a justice or a minister, the marriage is deemed lawful, although the officer, for his irregularity, may have incurred the penalty of fifty pounds. But a marriage, merely the effect of a mutual engagement between the parties, or solemnized by any one not a justice of the peace or an ordained minister, is not a legal marriage, entitled to the incidents of a marriage duly solemnized. The woman, when a widow, cannot claim dower, nor the issue seisin by descent.

Whether cohabitation, after such a pretended marriage, will subject either of the parties to punishment, as guilty of fornication, may depend on circumstances. If either of the parties were circumvented, and verily supposed the marriage legal, perhaps such party would be protected from punishment, on the general principle, that to constitute guilt, the mind must appear to be guilty. But every young woman of honor ought to insist on a marriage solemnized by a legal officer, and to shun the man who prates about marriage condemned by human laws, as good in the sight of Heaven. This cant,

(5) *Stat. 7, Will. 3, 6. — 1785, c. 69*

(6) *Stat. 1784, c. 40, § 5.*

(8) *Stat. 4, Ann. c. 6. — 1786, c. 3.*

(7) *Stat. 1785, c. 69.*

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she may be assured, is a pretext for seduction ; and, if not condemned, will lead to dishonor and misery.

* Upon the whole, it is the opinion of the Court, that [* 58] the mutual engagement of the parties, in this case, to take each other for husband and wife, in the room where a justice was present, he not assenting, but refusing to solemnize the marriage, is not a lawful marriage, so that the woman, or her issue by *Stephen Temple*, could acquire a derivative settlement from him in *Worcester*; and the verdict must stand.

Judgment on the verdict.

JOEL HEMMENWAY versus ALPHEUS STONE.

A promissory note in form, "*I promise to pay*," &c., and subscribed by two persons, is a joint and several note.

THE declaration in this case was in *assumpsit*, and contained two counts, upon two several notes of hand, the contents of which the plaintiff claimed as endorsee. In the second count, upon which alone the question in this case arose, the plaintiff declares upon a promissory note, made by the defendant to one *Frederick M. Stone*, or order, dated March 9th, 1804, payable on demand, with interest, and endorsed by the said *Frederick* to the plaintiff. Upon this count a verdict was found for the plaintiff, at the sittings after the last October term, in this county, upon a trial had before *Sewall, J.*, upon the general issue, subject to the opinion of the Court, upon the report of the judge.

The report states that the plaintiff, to maintain the second count, offered a note of hand, dated March 9th, 1804, expressed thus: "*I promise to pay Frederick M. Stone, or order*," &c., signed *Bowman Chadwick*, and below, by the defendant. This note was objected to, by the defendant, as incompetent evidence in this action. This objection was overruled. The defendant then attempted to prove the note had not been transferred in March, 1805, and that he had adjusted it with *Frederick M. Stone*, before it was endorsed, had paid him the money in part, and had given him another note for the balance. The evidence to this purpose, and other evidence on the part of the plaintiff to *encounter it, was left to the jury; who were directed [* 59] by the judge, if they believed the note offered in evidence had not been transferred before March, 1805, when it must

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be considered as discredited, and had been adjusted with *Frederick M. Stone*, before it was endorsed, by a payment in part, and another note given for the balance, to find for the defendant; but if not satisfied upon these points, to find for the plaintiff.

Bigelow, for the defendant, objected that the note declared on in the second count was not sufficiently described.

The note produced in evidence is the joint note of two promisors; whereas, the declaration counts upon it as the single note of the defendant. This objection, he said, would not have been urged, but that the defendant was unfortunately precluded from the evidence necessary to prove a more equitable and substantial defence, which in fact existed.

By the Court. The defence set up, respecting the payment of the note in question, was a legal one, and the direction of the judge upon it was right. If the promisee, while he held the note, was satisfied that the note was discharged, by a subsequent endorsement, no right passed to the endorsee, and he could maintain no action upon it. (1) As to the facts, there was evidence on both sides, and it was properly left to the jury to decide on its effect. They have decided for the plaintiff; and we cannot say that their decision was against the weight of evidence.

As to the other objection, if this note is not several, as well as joint, then it will not comport with the declaration. But we are satisfied, that a note of this description is both several and joint. It is the note of both and each of the subscribers, and, therefore, was rightly admitted in evidence. Upon the whole, there does not appear any good ground, on which a new trial ought to be granted. (2)

Judgment on the verdict.

(1) 5 *Mass. Rep.* 509, *Baker vs. Wheaton*.

(2) *Peake's N. P.* 130, *March vs. Ward*.

[* 60]

* *EDWARD TURNER versus THE INHABITANTS OF THE SECOND PRECINCT IN BROOKFIELD.*

One claiming ministerial taxes, must be the public teacher of one society, and that society must be an incorporated one.

THIS action, which was *assumpsit* for money had and received for the use of the plaintiff, was tried upon the general issue before *Sewall, J.*, at the sittings after the last October term.

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The sums demanded were stated at the trial to be the amount of certain assessments, paid by individuals, inhabitants of the said precinct, and there liable for parochial taxes, voted, and assessed, in the years 1805 and 1806, but who, in those years, had usually attended public worship with the plaintiff; and had employed him as their religious teacher.

The evidence, in support of this claim, was a compact in writing, dated March 15th, 1805, signed, among many others, by *Forbes*, *Hunter*, and *Pellett*, the persons whose assessments the plaintiff claimed; in which compact the subscribers mutually engage to have stated annual meetings for choosing a select committee and officers, for the support of public worship, and to maintain each other against oppression, &c.; also another written document, dated September 22d, 1803, purporting to contain, among other things, a certificate of the ordination of the plaintiff, as an evangelist, or religious teacher, according to the *Abrahamic* covenant, &c., which was admitted in evidence, by the consent of the defendants, to have all the effect which the like testimony of the subscribers thereto would have, if sworn as witnesses in the trial.

From oral testimony it appeared that, in the years 1805 and 1806, the plaintiff's usual residence and home was at *Sturbridge*, which is contiguous to *Brookfield*; that in those years he had the care, as a religious teacher, of five distinct societies, understood to be similar associations with that in *Brookfield*, to whom he had engaged to preach one Sunday in each calendar month in a regular course, that is to say, at *Brookfield*, *Sturbridge*, *Charlton*, and *Oxford*, and as often *as a fifth Sunday happened in a [* 61] month, at *South Brimfield*, places not more than seventeen miles distant from the said second precinct in *Brookfield*.

From the same testimony it appeared, that the plaintiff and his adherents call themselves *Universalists*, and profess to teach and believe a final redemption of the whole family of mankind, a continuance after death of the means of probation, and a restoration, sooner or later, of all moral beings to a capacity of happiness, and a state of salvation, through the mediation of *Jesus Christ*, though not without a suitable reformation and conformity of the creature, &c.; that the persons whose assessments are demanded usually attended public worship with the plaintiff, and that he preached to them, in the course of the years mentioned, as often as twelve Sabbaths in each year, at a meeting-house, in the said precinct, originally erected by a voluntary society of the persuasion called Baptists, among whom were some now associating as Universalists; that the said meeting-house and the pews therein are, and were, in the years 1805 and 1806, occupied, and understood to be owned, by individu

als, a large majority of whom continue of the persuasion called Baptists, and who, in the year 1805, became an incorporated Baptist society; but being without any constant or regular teacher, the plaintiff preached in their house, when there happened to be no teacher of the Baptist persuasion employed.

Upon this evidence the judge directed a nonsuit, subject to the opinion of the Court upon the foregoing report, the plaintiff moving to have the nonsuit set aside, and for a new trial.

F. Blake for the plaintiff.

Upham and Bigelow for the defendants.

By the Court. The plaintiff's claim must rest on the third article of the declaration of rights. The construction of that article has been several times before us. In the case of *Kendall vs. The Inhabitants of Kingston*, (1) the plaintiff was a Baptist teacher, having been ordained as an evangelist; and he had the care of two voluntary unincorporated societies of Baptists, one in *Middle-*
[* 62] *borough*, and the other * in *Kingston*, to which he preached alternately. And it was decided that he was not the public teacher of either within that article; that every public teacher therein contemplated, is a public Protestant teacher of piety, religion, and morality, connected with some one religious society, which is entitled to his ministerial labors, exclusive of the claims of any other society upon him. On this principle the nonsuit must stand, for the plaintiff is ordained, not over any particular society, but as an evangelist, and is, in fact, as much the public teacher of three or four other religious societies, as of the society in *Brookfield*.

In the case of *Barnes vs. The First Parish in Falmouth*, (2) the plaintiff claimed to be a Universalist, and teacher of a voluntary unincorporated society of his own persuasion in that parish; and it was holden, by four judges, being all the court present, that the public teacher, contemplated in the third article of the declaration of rights, must be a public Protestant teacher of some religious incorporated society, authorized and compellable by law to support a public religious teacher, and not of a voluntary association, which was under no legal obligation to elect or support any teacher. On this ground, also, the nonsuit must stand, for the plaintiff claims to be a teacher of a voluntary association only, and not of any incorporated society.

Costs for the defendants.

(1) 5 *Mass. Rep.* 524.

(2) 6 *Mass. Rep.* 401.

ELIAKIM DAVIS, *qui tam*, versus DANIEL SAUNDERS.

Practice.— In a popular action, to recover a forfeiture for taking excessive usury, the plaintiff had leave to amend his declaration, on payment of costs; he suggesting that he was barred, by the statute of limitations, from commencing another action.

THIS was a popular action, for the forfeiture imposed by statute of 1783, c. 55, for restraining the taking of excessive usury.

Lincoln, for the plaintiff, moved for leave to amend his declaration, by correcting the description of the promissory note, upon which the usury was alleged to have been taken and received; and he suggested, as a ground of his motion, *that [* 63] the statute of limitations (*stat.* 1788, c. 12,) had begun to run; so that it was too late to commence a new action. *The Court* granted the amendment, upon payment of full costs.

Blake for the defendant

ISAAC NICKOLS, Petitioner for a Review, versus DWIGHT FOSTER.

Practice.— The Court would not stay execution upon a petition for a review, where the petitioner had failed to serve the first order of notice, and before a second would be returnable, the year would expire, within which execution must issue.

THE petition, in this case, which was presented at the last April term in this county, stated that the respondent had recovered a judgment against the petitioner for 907 dollars 65 cents, damage, with costs, at the Court of Common Pleas for this county, September term, 1809, and, for reasons set forth, prayed for a review.

At the last term, notice was ordered returnable at the present term, and a stay of execution upon the petitioner's giving bond, with sureties, to respond the judgment on the review, or to pay the amount of the former judgment, in case the action should not be reviewed. No notice having been given, *Blake*, for the petitioner, now moved for a new order of notice, and for a further stay of execution.

The Court granted the order of notice, but refused to stay the execution further, because the year would expire, within which execution must issue, and the plaintiff would thus be put to his *scire facias*, or an action of debt upon the judgment.

HENRY CARY *versus* JOHN PRENTISS.

A mortgagor, being sued as the trustee of the mortgagee, was committed to prison, as such trustee, from whence he was discharged by taking the poor debtor's oath; and he was afterwards released by the creditor in the foreign attachment; it was held that the mortgagee was entitled to judgment for possession, notwithstanding the above facts.

THIS was an ejectment, upon a deed of mortgage brought by the mortgagee against the mortgagor, to obtain possession of the mortgaged premises, and the action was submitted to the decision of the Court upon a case agreed.

[* 64] *The facts in the case were, that on the 28th of September, 1807, *Prentiss* made his promissory note, not negotiable, to *Cary*, for 1180 dollars, and gave the mortgage, on which this action is brought, as collateral security for the payment of the note; that, in 1808, one *John Henry* sued said *Cary*, and summoned *Prentiss* as his trustee; in which suit *Prentiss* appeared and disclosed the giving of said note, and judgment was rendered against *Cary*, upon his default, for 1323 dollars 83 cents, damage, and costs, and execution also ordered against *Cary's* goods, effects, and credits, in the hands of *Prentiss*; that said execution being returned unsatisfied, *Henry* sued his *scire facias* against *Prentiss*, upon which he again appeared and disclosed the said note and mortgage; and such proceedings were had in the last-mentioned action, that at March term, 1809, *Prentiss* was adjudged the trustee of *Cary*, and an execution issued on the said judgment against *Prentiss*, by force of which he was committed to prison, where he remained until he was liberated by virtue of the statute of 1787, c. 29, made for the relief of poor prisoners in execution for debt; and that, on the 7th of June, 1810, *Henry* executed a release to *Prentiss* of the said judgment, as well damages as costs.

If, upon these facts, the Court should be of opinion that the plaintiff could lawfully maintain this action, the defendant agreed to be defaulted, and that judgment be entered for the plaintiff, as in cases of mortgage; otherwise the plaintiff agreed to become nonsuit.

Blake, for the plaintiff, argued, from the statute of 1794, c. 65, § 8, that a trustee, in a foreign attachment, is not discharged against his principal, but by having surrendered his goods, effects, and credits, to be taken in execution. Here, that had not been done, and the plaintiff's demand, for which this action was instituted, remains in the same state as before the defendant was summoned as trustee. The plaintiff is still liable to *Henry* for his whole

debt, notwithstanding the proceedings which have been had against the defendant, as the trustee of the plaintiff.

* *Smith*, for the defendant, argued that his client, having [* 65] been charged in execution for the debt which the mortgage now sued was made to secure, considered himself discharged, as against the plaintiff, from both the note and the mortgage. Should the land demanded be unequal in value to the note, *Cary* may yet bring his action on the latter, and the defendant be liable to a second commitment in execution for the same cause of action. For if the plaintiff can now recover on the mortgage, no reason can be given why he shall not recover on the note also, if the mortgage is an insufficient security. If *Henry's* release has any effect, it should seem to be a discharge, as well against *Cary* as against *Henry*. But it is apprehended that the release, being since the commencement of the present action, cannot alter the rights of the parties as they then existed.

Per Curiam. The plaintiff is entitled to his judgment. There is no defence at law; and since the release was given, there is none in equity.

Defendant defaulted

WILLIAM CUNNINGHAM *versus* PORTER KIMBALL.

When the evidence at the trial differs from the declaration, in a part not constituting the gist of the action, the Court will not send the cause to a new trial.

THIS was an action of trespass on the case for the recovery of damages for a deceit in the sale of a mare.

The declaration contained several counts for the same cause of action. The fifth count, upon which the verdict was taken, alleges that the defendant, at, &c., on, &c., being possessed of a mare, which was unsound, and infected with a bad and inveterate sore in her shoulder, which rendered her of no value; and the plaintiff being then and there also possessed of a mare and a pair of steers, as of his own proper goods, of the value of eighty dollars; the defendant, to induce the plaintiff to exchange his said mare and steers with the defendant, for his said mare, and a note, or piece of paper, did, then and there, falsely and fraudulently affirm to the plaintiff, that his, the defendant's, mare was well, sound, *and good. Whereupon the plaintiff, giving full credit [* 66] to the said affirmation, was instantly induced to, and did

then and there, deliver his said mare and steers to the defendant, in exchange for his said mare, and a note, or piece of paper; and the defendant then and there delivered his said mare, and a note, or piece of paper, to the plaintiff, in exchange for his said mare and steers. The plaintiff then avers, that the defendant's mare was not, at the time of the delivery, exchange, and affirmation, aforesaid, well, sound, or good; but was infected with a bad wound, or swelling, commonly called a *fistula*, in and over her shoulder, which made her utterly unfit for service, and good for nothing; of all which the defendant was well knowing; and so, by means of his said false affirmation, hath greatly injured and defrauded the plaintiff.

The cause was tried, upon the issue of not guilty, before *Sewall, J.*, at the sittings, after the last September term, in this county.

At the trial the plaintiff produced a witness, who testified that he was present at the time of making the bargain, but did not hear the conversation which passed between the parties; that he was called upon by the defendant to witness the bargain, and the defendant then stated, in his presence, that he had agreed with the plaintiff to deliver to him a bay mare, which was not then present, safe and sound; that he was to have a horse of the plaintiff in exchange, which was then and there delivered; and that the plaintiff was to keep a certain pair of steers, understood by the witness as then belonging to the plaintiff, for one week, and that the defendant was to deliver a piece of paper to the plaintiff, the nature of which he, the witness, did not know; and that he, the witness, received a paper from the defendant, which he delivered to the plaintiff, but did not know what the paper was. It was also in evidence that the steers were a part of the bargain. The defendant objected, that this evidence did not support any one count in the plaintiff's declaration, because it was not alleged in any [* 67] * of the counts, that the plaintiff was to keep the steers a week. The judge overruled this objection, and directed the jury that the variance was immaterial; and thereupon the jury returned a verdict, in which they found the defendant guilty as to the fifth count, and not guilty as to the other counts.

The defendant's counsel excepted to the direction of the judge to the jury, and thereupon moved for a new trial. The action stood over to this term, upon the said motion; and now

A. Bigelow, in support of the exception, argued that there was a material variation between the contract, as charged in the declaration, and as it was shown in evidence at the trial. The action

being founded on a contract, the contract ought to be truly set forth, and to be proved as set forth. (1)

Bigelow, sen. for the plaintiff. The authorities cited do not apply to the point before the Court. In all of them the variance related to what constituted the gist of the action, which, in the case at bar, is the false affirmation.

This false affirmation of the defendant being the gravamen of the action, and the jury having found it, the Court will not send the cause to another trial, merely to determine the unimportant question, whether the plaintiff did, or did not, undertake to keep a pair of steers for the defendant one week. If he did so undertake, and has failed to fulfil his engagement, the defendant may bring his action; if not, he has no cause of complaint.

Blake, in reply, urged the necessity of a conformity between the injury alleged and that proved. If verdicts are not set aside for variances like that which exists in this case, a verdict and judgment in one action will cease to be a bar to another for the same cause. Here the keeping the steers formed an essential article of the bargain; and if the terms of the bargain do not form the gist of the action, and are to be considered as inducement only, the case of *Bristow vs. Wright & Al.* is in point to show that, even in such case, the *allegata* and *probata* must agree.

* The counsel for the defendant moved also in arrest of [* 68] judgment, on the ground that the count, upon which the verdict was taken, was uncertain and insufficient; but they did not appear to rely much upon it.

By the Court. The objection in this case arises from a supposed variance between the declaration and the evidence given at the trial. If the action had been founded on the contract, and the gravamen had been the non-performance by the defendant of his part of it, there would have been some weight in the objection. But the whole gist and foundation of the plaintiff's action is the defendant's false and fraudulent affirmation; and, in this view, the variance is not such as to make it necessary or fit to send the cause to another trial; since the jury had all the essential facts before them, and have given their verdict thereon.

As to the motion in arrest of judgment, there seems no ground for it. The evidence at the trial explained any apparent uncertainty in the declaration. (a)

Judgment on the verdict.

(1) 5 *Esp.* 133, 127, *Lord Raym.* 735, 792, *Sands & Al. vs. Ledger.* — *Doug.* 615, *Bristow vs. Wright & Al.*

(a) [It is not easy to see how the evidence at the trial could affect a motion in arrest of judgment. — Ed.]

AARON GATES *versus* ELIJAH CALDWELL AND AL.,
Executors, &c. of JOSEPH CALDWELL.

There may be implied covenants, or covenants in law, in a deed containing express covenants; but such implied covenants must be consistent with those expressed.

THE declaration was "in a plea of covenant broken, for that the said *Joseph Caldwell*, at said *Barre*, on the 19th day of August, 1806, then alive, by his deed, of that date, duly executed, acknowledged, and recorded, and in court to be produced, in consideration of 3400 dollars, paid him by the plaintiff, did grant, sell, and quit-claim, to him, his heirs and assigns, all the said *Joseph Caldwell's* right, title, claim, and demand, in and unto the following pieces of land, with the buildings thereon, *viz.* &c., for a more particular description of the bounds of which said pieces of land, the said *Joseph Caldwell* referred to a mortgage deed thereof, made to him by one *Perry*, bearing date July 13, 1803, which deed [* 69] * had been duly acknowledged and recorded, and by which mortgage deed, as the plaintiff avers, the sum of 3000 dollars, with the interest thereon from the date thereof, was fully, sufficiently, and completely secured, to be paid to the said *Joseph Caldwell*, his heirs and assigns, by the said *Perry*, according to the said *Perry's* note of hand, therefor given, to the said *Joseph*, of even date with the said mortgage deed, which mortgage deed and note were then in the possession of the said *Joseph*, in full force, and no part of said sum having been paid thereon; and in and by his said deed the said *Joseph* did covenant with the said *Gates*, to warrant, secure, and defend, the said granted and quit-claimed premises to the said *Gates*, and his heirs and assigns, forever, against the lawful claims and demands of all persons claiming from, by, or under him; and also that the said *Gates* should have all the benefit of said mortgage deed, and note, and sum of money, and interest due thereon from the said *Perry*, and secured thereby. Now the said *Aaron* in fact says that the said *Joseph* did afterwards, *viz.* on the 21st day of January, 1807, receive of the said *Perry* full satisfaction and payment of said sum of money due to him by said mortgage, and on said note, and did acknowledge and cause such satisfaction and payment to be entered in the margin of the record of said mortgage, in the register's office in said county, in the following words, *viz.* "I, *Joseph Caldwell*, mortgagee in the deed here recorded, having received all the money meant to be secured by said deed, do, in consideration thereof, release and discharge the

same ;” and did sign the same, whereby the said mortgage is wholly defeated, discharged, and released, so that the said *Aaron* cannot hold said land free from the claims and demands of all persons claiming by and under the said *Joseph* ; and cannot have the benefit of said mortgage deed, note, or sum of money, or interest due thereon and secured thereby ; and so the said *Aaron* saith that the said *Joseph Caldwell* his covenant aforesaid did not keep, but did break the same, to the damage,” &c.

* The defendants, in a second plea in bar, pray oyer of [* 70] the deed declared on, and when spread upon the record, it is found to contain only a covenant to warrant and defend the premises conveyed to the plaintiff and his heirs, &c., against the lawful claims of all persons claiming by or under the grantor ; and not to contain the covenant respecting the mortgage deed, &c., alleged in the declaration. After oyer the defendants plead a bad plea, to which the plaintiff demurs generally, and the demurrer is joined by the defendants.

Bigelow, for the defendants, contended that the declaration was bad, as alleging at the same time express covenants contained in the deed, and also other covenants, which might perhaps have been implied, if there had been no express ones. Where, in a deed, there are express covenants, none are implied.

Bangs, for the plaintiff, was stopped by the Court.

Curia. The objection is to the declaration, and in a point of form only ; it being contended, that as there were express covenants in the deed, it was not competent for the plaintiff to declare upon an implied covenant. We do not understand, however, that the declaration rests upon an implied covenant ; but that the plaintiff has spread out at length what he apprehends to be the legal effect and operation of the express covenant ; and this he has a right to do, although in this case it seems not to have been necessary.

But we do not admit that there can be no covenants in law, or implied covenants in deeds which contain express covenants. There can be none contradictory to express covenants, but there may be implied covenants, which are consistent with those expressed in the deed. The plea in bar is bad and insufficient, and judgment must be entered for the plaintiff.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME JUDICIAL COURT,
IN THE
COUNTY OF NORFOLK, OCTOBER TERM, 1810,
AT DEDHAM.

—◆—
PRESENT:

HON. THEOPHILUS PARSONS, CHIEF JUSTICE,
HON. THEODORE SEDGWICK, }
HON. SAMUEL SEWALL, } JUSTICES.
HON. ISAAC PARKER, }

—◆—
JOHN BARNARD *versus* LEWIS FISHER.

Where justices of the peace happen to be appraisers of lands, upon which execution is about to be extended, they may administer the oath to each other.

Or the oath may be administered by the judgment debtor, if he be a justice of the peace.

In the levying of an execution upon three several tracts of land belonging to the debtor, it is not necessary to make a several appraisement of each.

Where appraisers of land levied upon deducted from its actual value the supposed amount of an encumbrance from a previous attachment, at the suit of another creditor, in which judgment was not rendered, their proceedings were held to be irregular and void.

Where such a prior attachment exists, the second attaching creditor should delay his proceedings in court, until the suit, on which the first attachment was made, be determined.

THIS was a writ of *entry sur disseisin*, in which the demandant counts on his own seisin within one year, and on a disseisin by the tenant, of four several parcels of land.

BARNARD *vs.* FISHER.

The action was tried upon the general issue, before *Sewall, J.*, at the last March term in this county, and a verdict taken for the demandant, subject to the opinion of the Court, upon the report of the judge who sat in the trial, it being agreed that the verdict may be amended, or set aside, according to the opinion of the Court.

From the report of the judge it appears that several parcels of land, described in the writ, were duly appraised and set off, to satisfy an execution, which regularly issued * on a [* 72] judgment recovered by the demandant against *John Whiting* and *John Fairbanks*, at the Supreme Judicial Court in *Suffolk*, in July, 1809, by adjournment from the preceding March term. The land thus levied upon was the property of *Whiting*, one of the judgment debtors, and had been attached upon the demandant's original writ, and the levy was made within thirty days after the rendition of judgment.

The tenant's title was also under the levy of an execution upon the same lands, which execution issued on a judgment recovered by him against the said *Whiting* alone, at the Court of Common Pleas for this county, in April, 1808; and the land levied upon was attached, by the original writ, one day previous to the attachment made by the present demandant in his suit, and the levy was seasonably made.

Several objections were taken at the trial to this last levy, some of which being considered by the judge fatal to the tenant's title, the execution, and the proceedings thereon by the appraisers, and the return of the sheriff, were not admitted in evidence to the jury, and the cause came before the Court upon a motion for a new trial on the part of the tenant, on the ground that the judge improperly refused to admit the same in evidence.

The exceptions to the levy, under which the tenant claimed to hold the lands, as reported by the judge, were, that the appraisers were not duly sworn; and this because it appears that two of them were sworn before the third, he being a justice of the peace for the county of *Norfolk*, and duly qualified to administer the oath, unless his being an appraiser disqualified him; that this third appraiser was himself sworn by *Whiting*, the judgment debtor, he also being a justice of the peace, and duly qualified to administer the oath, unless disqualified by his being the judgment debtor, whose lands were to be appraised; that the statute of 1783, c. 57, § 2, requires that all the appraisers shall be sworn before *one* of the justices of the peace for the same county, whereas the appraisers in that case were sworn before two several justices.

* Another objection arises from the proceedings of the [* 73] appraisers, they having appraised three of the lots of land

levied upon at a sum in gross, without having specified the value of each lot; and having also appraised the same three lots as "*subject to the encumbrance of William Cochran's attachment, judgment not recovered.*"

The cause being continued *nisi*, came on to be argued at the last March term in *Suffolk*, when *T. Williams*, of counsel for the demandant, enforced the exceptions taken at the trial, and in support of that to the swearing of the two appraisers by the third, referred to the case of *Drew vs. Canady* (1) as analogous; but his principal reliance appeared to be upon the last objection, relating to the mode of appraisement.

J. Richardson, for the tenant, considered that the objections to the swearing of the appraisers, as also the first part of the objection to the appraisement, were of no great weight; but he was apprehensive that the last objection, made to the manner of the appraisement, could not easily be got over, and that as to the parcels of the land demanded, to which this objection applied, the demandant must prevail.

Afterwards, at the same term, the opinion of the Court was delivered by

PARKER, J. With respect to the objections taken at the trial, which relate to the swearing of the appraisers, we are all of opinion that they do not avail against the levy, so as to render it void.

The terms of the statute, relied on to support the third exception, can be construed to mean nothing more than that *any* justice of the peace, within the county, may administer the oath; and the practice adopted in this case, of administering the oath by one of the appraisers, who happens to be a magistrate, and he, either before or afterwards, taking the oath before some other magistrate, has prevailed very generally, and may often be convenient. We certainly see no legal objection to it.

[* 74] *The case of *Drew vs. Canady*, cited at the bar to support this objection, differs widely from the case under consideration. The principle, on which that decision rests, is that a referee should not, by any act of his own in another capacity, give himself a jurisdiction in a cause, which he is to hear and determine. The acknowledgment of the parties to a submission before a justice of the peace is essential to the jurisdiction of the referees. But appraisers derive their authority from the appointment of the sheriff, according to the provisions of the statute. The oath does not give them authority, but qualifies them for executing it.

As to the objection, that the judgment debtor administered the oath to one of the appraisers, we are also of opinion that this does not make void the levy. The counsel for the demandant has argued that he, being interested, is not a proper certifying officer of the fact, that the appraisers were sworn. It is a sufficient answer to the objection, that the return of the sheriff is the proper evidence that the appraisers were sworn; and it has been decided, we think correctly, that although there should be no certificate from the magistrate who swore the appraisers; yet if it appeared, by the return of the sheriff, that they were duly sworn, the levy would be val'd, if there were no other objection to it.

The other objection respects the proceedings of the appraisers. As to the first branch of this objection, that three separate parcels of the land levied upon were appraised by one estimate, without specifying the separate value of each parcel; since all the several lots of land were taken as *Whiting's* sole property, and as it is at least doubtful whether he could redeem one lot without redeeming the whole which was set off upon the execution, we are not prepared to say that it was necessary to make a separate appraisement of each lot.

But it is not necessary to determine this question; for, with respect to the three lots of land so appraised, we are all of opinion that, for another cause, the levy is void. This cause is contained in the last branch of the exception to the *pro- [* 75] ceedings of the appraisers, viz. that the appraisers deducted from the value of the land the supposed amount of an encumbrance; which encumbrance was an attachment in a suit pending at the time of the levy.

The consequences of establishing such a proceeding by our decision would be exceedingly mischievous.

A suit pending may be discharged in various ways, without ever coming to judgment. The plaintiff in the suit may fail of proving his demand on trial, may become nonsuit or discontinue; or, if he should finally prevail, his damages are uncertain until judgment is rendered. And even after judgment, the debtor may satisfy it without an execution being sued; or the creditor may seize other property upon his execution; or he may take the person of his debtor; or may neglect to levy his execution upon the land attached, until he has lost his lien by the expiration of thirty days after judgment. In all which cases the land is free for the second attaching creditor, without any diminution of its value by reason of any prior attachment.

Now, amidst all these uncertainties, to value an attachment on an undetermined suit, as an encumbrance upon the land, would be pal-

pably absurd. If the appraisers conjecture the value,—and they can do little more,—it follows that the land will not be justly appraised; and it might well happen, if such were the law, that the creditor, who causes his execution to be levied on land so circumstanced, having the conjectural value of such an encumbrance deducted, might obtain a title to the land of his debtor for a sum beyond all proportion less than its known value, and thus, instead of having his debt satisfied, which is all that the law contemplates, may profitably speculate upon the misfortunes of his debtor; who may be unable, without great sacrifices, to redeem his estate within the time limited by law.

For these reasons the Court are unanimous in opinion, that the proceedings of the appraisers, with respect to the three first described lots of land, were irregular and void. And the [* 76] verdict must be established, and judgment rendered * accordingly in favor of the demandant for that part of the land demanded. And as no sufficient objection appears to the levy upon the remaining lot, the verdict must be altered, so that the tenant may continue to hold that lot against the demandant.

To prevent difficulties of this serious nature in future, it may be proper to observe, that when land is attached, and it is known that there has been a previous attachment upon it, the practice has been for the second attaching creditor to delay his proceedings in court, until the suit, on which the prior attachment was made, is concluded. So that if there should be a levy by the first creditor, the second may take whatever is left; or, if the whole should be taken, he may look to other property for the satisfaction of his judgment; or, if there should be no levy by the first creditor, he may then have all the land to levy upon. The only inconvenience of this practice is the delay, which a creditor thus situated may submit to or not, according to his opinion of the ability of the debtor to discharge the debt from other property than that which is thus attached.

of the replication; and we are all satisfied that the replication is no sufficient answer to the bar.

It appears from the allegations of the demandants, that they were never seised in fact of the premises, but only of the right, as *Bussey*, on the death of their father, abated them. But this right could not pass by their conveyance to *Dunbar*, because the law will not permit any person to sell a quarrel. (a) The deed, therefore, executed to *Dunbar* being void as a conveyance, it was competent for the demandants to release to *Beaumont*, he being actually seised of the freehold, either by right or by wrong; for the demandants have sued him as tenant of the freehold. But their release [* 78] will * operate to pass the right to the tenant in possession; and the right on which the action was founded having passed, the action can no further be maintained.

But it was said, in the argument, that the replication discloses facts confessed by the demurrer, which avoid the release as a fraud on *Dunbar*, for whose use the action is sued. If the release is shown to be fraudulent, it will have no legal operation in favor of the tenant, a party to the fraud. The facts thus disclosed are the prior deed executed to *Dunbar*, the suing the action for his use, and the knowledge thereof by *Beaumont*. Now, this knowledge of *Beaumont* can have no tendency to give any legal effect to the deed to *Dunbar*, the demandants' right still remaining, not conveyed nor extinguished; for the deed being void, as a conveyance, no collateral transaction whatever, under any circumstances, can give it any operation to pass the right. The demandants thus having a right which could pass by release to *Beaumont*, might regularly pass it, and were not estopped by any principle or maxim of law. The knowledge of *Beaumont* of the deed to *Dunbar*, as it cannot, on the one hand, give validity to that deed, so neither on the other hand can it defeat the release to himself.

The transaction between the demandants and *Dunbar* was prohibited by law, (1) and their mistakes, or ignorance of the law, can not avail him. Indeed, the buying up of titles by a stranger, when the grantor is not seised, is an offence at law; and it was a lawful act in *Beaumont*, who was in fact seised, to protect his title, by purchasing the release of the right in the demandants, notwithstanding his knowledge that an illegal attempt had been made to obtain that right by a conveyance. For it would be an unreasonable imputation upon the law, to charge it with avoiding a release, in order indirectly to give any effect to an illegal act.

(a) [*Swett & Al. vs. Poor & Al.*, 11 *Mass. Rep.* 549. — *Brinley vs. Whitney*, 5 *Pick* 348. — *Wolcott & Al. vs. Knight & Al.*, 6 *Mass. Rep.* 418. — Ed.]

(1) 1 *Hawk. P. C. c.* 86.

The allegation, that the demandants, in selling to *Dunbar*, and this latter in purchasing, supposed and believed that they were acting lawfully, if it be true, can have no legal effect; nor if it be untrue, can it, from the nature of it, be traversed and put in issue.

* Let an entry be made, that it appears to the Court [* 79] that the replication is bad and insufficient in law.

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MARY SUMNER, Petitioner for Partition, *versus* JOHN PARKER.

The judge of probate has no authority to assign the reversion of the widow's dower to one of the heirs, in exclusion of the rest; and a decree to that effect, of forty years' standing, was held to be void, and the land yet subject to partition.

THE parties submitted this suit to the decision of the Court upon an agreed statement of facts, from which it appears that the land, of which partition is prayed for by the petitioner, is land of which *John Ruggles* died seised, in fee simple, in 1754. On the 26th of March, 1764, the said *Ruggles* having died intestate, the judge of probate for the county of *Suffolk*, within which the land then was, issued a warrant for the distribution thereof to three freeholders; in which they were directed to make partition or distribution of the real estate of the deceased, and to assign one third thereof to the widow as her dower; and if the remaining two thirds could be divided among the six children of the intestate, to make such division; otherwise to report whether the estate was "convenient for one or more settlements, and to make appraisement thereof accordingly." The commissioners reported that the estate was not capable of a division amongst all the children, without prejudice thereto; and would make but one good settlement. They reported an appraisement of the estate, and assigned the land, of which partition is prayed, to the widow, as her dower. Thereupon the judge of probate assigned the whole estate, including the reversion of the widow's dower, to *Sarah Parker*, one of the intestate's daughters, the wife of *Peter Parker*, who had previously given his bond to the judge of probate, to pay to the other heirs their respective proportions of the value of the estate as estimated by the commissioners; two thirds to be paid in one year with interest, and the other third

SUMNER vs. PARKER.

in a year after the expiration of the dowager's estate, with interest from that time. The respondent is the son and heir of [* 80] *Sarah Parker*, to whom *the assignment was made.

Within the year from the date of his bond, the said *Peter Parker* paid to *Joseph Weld*, and his wife *Mary*, the petitioner, two third parts of her proportion; and on the first of August, 1807, after the death of his mother, the respondent tendered to the petitioner the remaining third part, with interest thereon from the first day of March, 1804, on which day the dowager died.

The cause was argued at the last March term, in *Boston*, by *Ward* for the petitioner, and by *Dexter* and *Gray* for the respondent.

Ward contended, 1. That the judge of probate had not, by the laws then in force, any authority to settle the reversion of the widow's dower, on one or more of the heirs, to the exclusion of the others. 2. That he had no authority to cause partition of it among the heirs, until the expiration of the estate in dower. 3. That it could not be within the intention of the statutes, to give the judge power to divest a *feme covert* of her lands, and change them into money, which became instantly the absolute property of her husband. 4. That the estate of the intestate consisting of several distinct and unconnected parcels of land, there was no pretence for considering it as within the intentions of the legislature, in providing for a case where the lands cannot be divided *without prejudice to, or spoiling the whole*.

For these reasons, he insisted that the decree of the judge of probate, by which he assigned the reversion of the widow's dower to the mother of the respondent, was *ipso facto* void and of no effect, and that consequently the petitioner was well entitled to her purparty in the estate so illegally assigned. (1)

Gray argued that the decree, being upon a subject matter within the jurisdiction of the judge, *viz.* the settlement and distribution of an intestate estate, was valid and binding on all parties, unless duly reversed upon appeal; (2) and the petitioner, by neglecting to appeal from the decree, declared her assent to it; and especially by receiving the money ordered by the same decree to be paid her for her share of the other two thirds of the estate.

[* 81] *It has been settled in *Hunt vs. Hapgood*, (3) that the judge of probate has not authority to assign the reversion, after its expiration, to one or more; and if such authority does not exist at the time of assigning the dower, the consequence must be

(1) 2 *Mass. Rep.* 120, *Wales vs. Willard*. — 2 *Lev.* 23, *Frumpton vs. Petrie*.

(2) 1 *Roll. Rep.* 158, 9. — *Cro. Eliz.* 315. — 2 *Salk.* 674. — 4 *D. & E.* 596. — *Carth.* 274.

(3) 4 *Mass. Rep.* 420.

that the dower must in every case be distributed, however inconvenient; and when it is considered that the rule applies to dower in houses as well as lands, the inconvenience will appear to be intolerable.

As far as contemporaneous construction was to have influence in determining the intention of a statute, *Gray* believed the practice to have been wholly such as took place in this case; and he produced from the probate office, in *Suffolk* county, a certified list of more than forty cases, where the reversion of dower had been settled upon one or more of the heirs of an intestate, to the exclusion of the rest.

Dexter argued that this was a subject of which the Probate Court had jurisdiction; and, therefore, not like the case of *Wales vs. Wil-lard*, where there was an express restraint and prohibition by statute. Here the judge is authorized to settle the whole estate, and however erroneously or absurdly he may act, yet, having made his decree in judicial form, it is good until reversed by legal process. If it be said that he had not authority to settle the reversion of the dower until after the dowager's death, still he did but act prematurely, and although his decree may be voidable, it is not void. But he had authority to decree in some form as to this very reversion at the time he did. The statute directs him to assign one third part of all the estate to the wife, for her life, and *all the residue* of the real estate to and among the children, &c. The construction contended for by the petitioner would leave a part of "the residue" still to be divided, directly against the provision of the statute. And by the clause of the statute, which authorizes the assignment to the eldest, or other son, the judge may order "*the whole estate to such son,*" &c., in which must be included this reversionary estate. The construction, which the *respondent con- [* 82] tends for, is enforced by the entire silence of the statute of 1783, c. 36, in which the prior laws on this subject are revised, as to this particular portion of intestate estates. And indeed the words of the old statute, "the widow's thirds or dower in the real estate, at the expiration of her term to be alike divided as aforesaid," may well be understood to mean a division decreed at the original distribution, but not actually made until after the dowager's death. By such a construction all the mischiefs, which the court apprehended in the case of *Hunt vs. Hapgood*, will be prevented.

It is not now a question before the Court, whether this estate could or could not have been conveniently divided among all the heirs of the intestate. That question must certainly have been put at rest by the decree of the judge, as no appeal was made from it.

The argument from inconvenience can hardly be conceived to apply more strongly in any case than the one now under consideration. From the almost invariable practice, through the commonwealth, for so many years, a vast number of estates are now holden under assignments similar to this; and the mischief of overturning so many titles will be immense.

The action, still standing, continued *nisi* for advisement, the opinion of the Court, (except the *chief justice*, who did not sit in the cause, and *Parker, J.*, who did not concur in the opinion,) was delivered March term, 1811, in *Suffolk*, by

Sedgwick, J. The petitioner, immediately on the death of her father, became entitled, by the descent cast on her, to the proportion which she demands in the land assigned to the widow for dower. After the assignment of the dower, she was seised of the reversion after the termination of the estate in dower.

Was the decree, with the proceedings under it, sufficient to divest that estate, and vest it in the mother of the respondent?

[* 83] * All the authority which a judge of probate has upon this subject is given to him by statute; and beyond the limits of that authority, he cannot deprive an heir of his inheritance. If, *within* the sphere of his authority, he mistakes in the application of it, the decree is voidable, and may be reversed by the appellate jurisdiction; but is in force until its reversal. But if a decree be made upon a subject *without* the jurisdiction of the judge, it needs no reversal, but is merely void. This principle and distinction were declared in the case of *Wales vs. Willard*, mentioned at the bar. The question then is, whether any statute has authorized a judge of probate, *in the original distribution of the estate of an intestate*, when there are two or more heirs, to settle upon one of them the whole of the reversion in the widow's dower.

By the provincial act of 4 *Will. & Mar.*, c. 2, for the settlement and distribution of intestate estates, it is provided, so far as respects real estate, that division shall be made of it by five sufficient freeholders, (which, by the 33 *Geo. 2*, c. 2, may be done by five or three freeholders,) who, after assigning to the widow her dower, and after the payment of debts, were to distribute the residue, where there were children, (and where there had been no advancement in the lifetime of the intestate to those children,) among children, and those who legally represent them, in equal shares, except the oldest surviving son, who was to have two shares, where there was no issue of the first-born, or of any other elder son.

Then comes a proviso, that where the estate cannot be divided among all the children, without great prejudice to, or spoiling the whole; being so represented and made to appear to the judge, he

may order the whole to the eldest son, *if he accept it*, or to any other of the sons *successively*, upon his refusal; he *paying* to the other children of the deceased their equal shares thereof, by a just appraisement, to be made by three sufficient freeholders upon oath, or giving good security, in some convenient time, as the judge *shall limit, making reasonable allowance in the [* 84] interim, not exceeding six per cent. per annum.

The act then proceeds to determine how an estate shall be divided among collaterals, where there are no children; and it then provides for a distribution of the widow's dower, in these words: "the widow's thirds or dower in the real estate, *after the expiration of her term*, to be alike divided as aforesaid."

By the provincial act of 6 *Geo. 2, c. 3*, it is provided that, where the estate will accommodate more of the children than the eldest son, the judge is authorized to settle it on so many of the children, preference being always given to the sons, as it will accommodate, in the manner prescribed by the act of 4 *Will. & Mar.*

The provincial act of 33 *Geo. 2, c. 2*, after having authorized judges of probate to make partition at their discretion, by three or five freeholders, goes on to state, by way of preamble, that it sometimes happens that the estate to be divided consists of such distinct tenements, and under such peculiar circumstances, that an exact partition thereof cannot be made to each of the parties according to his share in the whole estate, without making such fractional divisions of a messuage, tract of land, or other tenement, as would be extremely prejudicial to the interested therein; it then proceeds to enact that in such case the same may be settled on one of the parties, not being a minor, he paying for owelty of partition, or to make a just and equitable partition, such sum or sums, to such party or parties, as by means thereof received less than their share of the real estate to be divided, and that the part so assigned should stand charged for the payment thereof.

These are all the provisions, which were in force at the time of the decree of the judge of probate; and which have an immediate or remote relation to the subject under consideration. Was, then, the decree of the judge of probate, whereby the reversion of the widow's dower was assigned to Mrs. Parker, made upon a subject within his jurisdiction? *had he at that time a [* 85] power to make any distribution of the reversion?

The act of *Will. & Mar.*, which is the foundation of settling the whole on *one*, to the exclusion of the other heirs, and where the authority of the judge is to be found, if any where, after having prescribed what shall be set off to the widow, goes on to provide, as before mentioned, that all the rest and residue of the real and

personal estate shall be divided to and among the children, &c., and this subject to the proviso, which authorizes *the whole* to be settled on one of the children. Now, it was ingeniously said in the argument, as the judge was directed to make a disposition of *the whole estate*, and as the reversion in the widow's dower was *part of the estate*, it followed of course, that the judge was authorized to make a disposition of that reversion. But this, clearly to my mind, was not the intention of the legislature.

It is to be observed, that the estate to be divided is the estate of the intestate, and does not include an estate created by the distribution itself, as is the reversion in the widow's dower; and so far as respects the distribution to the children, is after the assignment of the widow's dower, and is expressed to be, "of the surplusage or remaining goods and estate;" which expressions, so far from including, do necessarily exclude, the reversion in the widow's dower. And no power whatever is given to the judge, to make a division of the estate assigned to the widow as dower, but in an after clause of the statute, which is expressed, as already mentioned, in these words: "the widow's thirds or dower in the real estate *at the expiration of the term*, to be alike divided as aforesaid." It does not then appear from the statute, that the judge had any power whatever, at the time he made his decree, to settle the reversion in the widow's dower on Mrs. Parker; but the contrary, by necessary and inevitable implication, is apparent. The decree was, then, upon a subject not within the jurisdiction of the judge, and consequently not voidable only, but absolutely void.

[* 86] * In the case of *The King vs. The Inhabitants of Stotford*, which was cited at the bar, it was determined that an order of removal of a pauper, signed by two justices *separately*, and in different counties, is only voidable, and not void; and that the parish wishing to get rid of it must appeal to the next sessions. The ground of the judgment of the court, in that case, cannot be known, for it is not declared; but it is sufficient to show that it is not applicable to the case under consideration, that the order was made on a subject *apparently within* the jurisdiction of those who made it; whereas in this case, *on the face of the decree* it is apparent that it was made on a subject *without* the jurisdiction of the judge.

It is to be lamented that there have been so many similar decrees, and we should have been induced from that consideration, if it were possible, to sanction this decree. But it is impossible.

PARKER, J., considered that the judge of probate had jurisdiction of the subject matter of his decree, but that he exercised the same erroneously, and that it would have been reversed upon an appeal

to the Supreme Court of Probate; but having been made, and no appeal interposed, it was now too late to shake it; and this, he added, seems to have been the contemporaneous construction of the statute, as adopted in the several probate courts, and particularly in that of this county; and very many valuable estates were now holden under a similar title.

Judgment for partition

OBED FISHER *versus* SAMUEL HILL.

Where a devisee dies before the testator, leaving no lineal descendants, the devise lapses; if he leave such descendants, they take as purchasers.

IN this action *Fisher* demanded one undivided forty-eighth part of the land described in the writ. It was submitted to the decision of the Court, on a case stated and agreed by the parties.

John Fisher, on the 16th of August, 1796, was seised of the demanded premises, and on that day devised the same to *Thankful*, his wife, for the term of her life, remainder *in [* 87] fee to *Samuel Hill*, jun., son of the tenant. The said *Hill* died on the 4th of February, 1802, without issue, and unmarried; and on 25th of the same month the testator died seised. His will was afterwards duly proved, and the said *Thankful* entered and became seised of the premises for life, and continued so seised until the 6th of October, 1809, when she died. *Hill*, the tenant, entered after her death, claiming to hold as heir of his son. The demandant is one of the legal heirs of the testator, and, as such, is entitled to the share demanded in his writ, unless the tenant is entitled to hold the whole as heir to his son, the devisee of the remainder.

If the Court should be of opinion that the tenant is seised in fee as heir to his son, the demandant agreed to become nonsuit; but if the tenant can take nothing by force of the said devise, he agreed to be defaulted, and judgment to be rendered for the demandant to recover an undivided forty-eighth part, as demanded in his writ

J. Richardson for the demandant.

Hastings for the tenant.

By the Court. There can be no question but that this devise lapsed at the common law, by the death of the devisee before that of the testator. Our statute, of 1783, c. 24, § 8, only saves the devise, where the devisee dies leaving lineal descendants, who

"shall take the estate devised, in the same way and manner such devisee would have done in case he had survived the testator." Such descendants are purchasers, and take by a sort of statute devise. But the devisee, in the case at bar, left no lineal descendants. The case is, therefore, not within the statute; and the demandant is of course entitled, as an heir at law of the testator, to the part of the estate he demands in his writ.

Tenant defaulted

[* 88]

*THE INHABITANTS OF MEDWAY *versus* THE INHABITANTS OF NATICK.

A mulatto is a person begotten between a white and black.
The issue of such a person and a white is not a mulatto.

ASSUMPSIT for moneys expended by the plaintiffs in the support and maintenance of one *Roba Vickons*, a pauper, alleged by the plaintiffs to have had her legal settlement in *Natick*, and a child of the said *Roba*.

The parties agreed that judgment should be rendered on the following facts:—

The pauper is the daughter of *Ishmael Coffee*, of *Medway*. The said *Ishmael* is half black and half white. His wife, who is the mother of *Roba*, the pauper, is a white woman; the said *Roba* was married to one *Christopher Vickons*, of *Natick*, a white person, August 6, 1789, by the Rev. *Stephen Badger*, of said *Natick*. The said *Christopher* is dead, and at the time of his death had his legal settlement in the said town of *Natick*. The said *Roba*, and her child by the said *Christopher*, are residing in *Medway*, are poor and indigent, and have been relieved by the said town of *Medway*, &c.

If, upon these facts, it should be the opinion of the Court that the said *Roba* is a *mulatto*, within the meaning of the "Act for the more orderly consummation of marriages," (1) and that the said act, so far as it relates to a prohibition of marriage between a white person and a *mulatto*, and declaring the same to be null and void, is constitutional, then the plaintiffs agree to become nonsuit. But if the Court should be of opinion that the said *Roba* is not a mu-

(1) Stat. 1786, c. 3, § 7.

latto, or that the said act, so far as it relates to prohibiting the marriage of a white person with a mulatto, &c., is unconstitutional, then the defendants agree to be defaulted, and that judgment shall be rendered for the plaintiffs for the sum demanded by them.

Hastings for the plaintiffs.

J. Richardson for the defendants.

* *By the Court.* Two questions are referred to our [* 89] decision in this case.—1. Whether the legislature had authority, within the constitution, (the parties probably intending the declaration of rights prefixed to the constitution,) to declare a marriage of a white person with a mulatto to be absolutely null and void. It is unnecessary for us to declare any opinion we may have formed upon this question; as our opinion upon the second question, *viz.* whether the pauper is a mulatto, is sufficient for the decision of this action. And it is our unanimous opinion, that a mulatto is a person begotten between a white and a black. This is the definition given by the best lexicographers, and we believe it also to agree with the popular use of the term. The pauper's father, in this case, was a mulatto, and her mother was a white woman. The pauper is then not a mulatto. According to the agreement of the parties, there must be judgment for the plaintiffs. (a)

Defendants defaulted.

(a) [In Spanish *mulato*, and in French *mulâtre*, have the same meaning.—ED.]

PHINEHAS COLBURN *versus* GEORGE ELLIS AND OTHERS

Where one was, with his poll and estate, by a private statute, set from the town of *A.*, to a parish in *B.*, forever thereafter to be considered as belonging to the said parish, there to do duty and enjoy parish privileges; it was held that a person afterwards living on the same estate was a member of the parish in *B.*, and eligible as an assessor thereof; although as to municipal rights and duties he continued an inhabitant of *A.*

A collector of taxes is competent to collect taxes granted and agreed on before his appointment to office.

THIS action, which was trespass for an assault and false imprisonment of the plaintiff by the defendants, came before the Court upon certain agreed facts; from which it appears, that the defendants were duly appointed assessors of the third parish in *Dedham*, on the 14th of March, 1808; that during the same year the parish granted sundry taxes for parish purposes, which the defendants assessed upon

the parishioners, and amongst them upon the plaintiff, who was a member of the parish, and was assessed his just proportion of the taxes; that the assessments, with a regular warrant, were committed by the defendants, on the 27th of March, 1809, to one [* 90] *Ichabod Ellis*, who had been on that day *duly chosen and qualified as a collector of the parish for the then ensuing year, and the said assessments were so committed to him in consequence of a regular vote of the parish, before new assessors were elected; that there was a collector duly chosen and qualified for the year 1808; that the said *Ichabod Ellis*, by virtue of the said warrant, and after demand and refusal by the plaintiff to pay his said tax, and after waiting the time required by law, took him and committed him to prison until he paid the same; that *John Richards*, one of the defendants, was, while assessor as aforesaid, an inhabitant of the town of *Walpole*, but he owned and lived upon the farm, which was owned and occupied by *Enoch Ellis*, at the date of an act of the government, passed February 12, 1784, by which it was enacted that the said *Enoch Ellis*, and others in the said act mentioned, with their polls and estates, should be set off from the town of *Walpole*, and annexed to the third parish in the town of *Dedham*, and forever thereafter be considered as belonging thereunto, there to do duty and enjoy parish privileges; the said *Enoch Ellis*, while living and dwelling on said farm, and the said *Richards*, since he has owned and resided thereon, viz. more than thirteen years, having attended public worship, enjoyed parish privileges, been assessed to taxes, served in parish offices, and done other parish duties, in the said third parish of *Dedham*.

If the Court should be of opinion that the said assessments were legal, notwithstanding said *Richards* was an inhabitant of *Walpole*, and that they were lawfully committed to the said *Ichabod Ellis*, it was agreed that the plaintiff should become nonsuit; otherwise the defendants should be defaulted, and judgment be rendered against them for twenty-three dollars damage, and for the plaintiff's costs.

Hastings, for the plaintiff, argued that the persons set off by the act referred to, in the statement of facts, had only a personal privilege, which ceased at their death; but perceiving the Court [* 91] inclining strongly against him on this point, he *did not press it. But he contended more seriously on the other point, that *Ichabod Ellis*, to whom the assessment and warrant were committed, was not authorized by law to collect the taxes for the year 1808. For this he relied on the general statute of 1785, c. 70, respecting the power and duty of collectors. By the 16th section of that act, any parish is empowered to choose, annually in the month of March, one or more collectors of all such rates or assessments as

shall be granted or agreed upon by such parish; the plain meaning of which provision, he insisted, was, that a collector had authority to collect such taxes only as might be granted or agreed upon after he was in office; whereas the case here finds these taxes, for which the plaintiff was imprisoned, were granted and agreed upon during the year preceding that for which the collector was appointed.

J. Richardson for the defendants.

By the Court. Two grounds have been taken in support of this action. The first relates to the authority of the assessors, one of whom lived upon and owned a farm in the adjoining town of *Walpole*, which farm was owned and occupied in February, 1794, by one *Enoch Ellis*, who was, by the private statute of 1783, c. 27, with several other persons named in the act, together with their polls and estates, set off from *Walpole* and annexed to the third parish in *Dedham*, to which parish the act declares they shall forever thereafter be considered as belonging, there to do duty and enjoy parish privileges.

The effect of this act was permanently to alter the boundaries of the parish, so far as to include therein the lands then owned by the persons named in the act, and to make every person afterwards living upon those lands, or upon any part of them, members of the parish in *Dedham*, although as to municipal duties and rights they continued to be inhabitants of *Walpole*.

It follows, then, that *Richards*, one of the assessors, who owned and lived upon the farm which, at the date of the act *of 1784, belonged to *Enoch Ellis*, was eligible as an [* 92] assessor of the parish, and, when chosen and sworn, was legally authorized to execute the duties of that office.

The second point applies to the authority of the collector; and a provision of the statute of 1785, c. 70, for the choice and appointment of collectors, and for ascertaining their power and duty, has been cited in support of this objection.

But the meaning of the provision is misconceived. When the statute gives authority to collectors to collect all such assessments as *shall be granted or agreed upon*, it intends all such assessments as should be granted or agreed upon after the passing of the law; and not after the appointment of the collector.

Neither of the points made for the plaintiff being in our opinion sufficient to support his action, the defendants are entitled to judgment.

Plaintiff nonsuit.

C A S E S
ARGUED AND DETERMINED
IN THE
SUPREME JUDICIAL COURT,
IN THE
COUNTY OF BRISTOL, OCTOBER TERM, 1810,
AT TAUNTON.

PRESENT:

HON. THEOPHILUS PARSONS, CHIEF JUSTICE.
HON. THEODORE SEDGWICK, } JUSTICES.
HON. ISAAC PARKER, }

SIMEON BORDEN, Petitioner, *versus* NATHAN BROWN

Reviews are had only in actions commenced by writ.

THIS was a petition for leave to review an action heretofore determined in this Court. Upon the petition being read, it appeared that the former action was a petition for partition of lands, under the statute of 1783, c. 41.

By the Court. Reviews are provided only where the original action is commenced by writ. We have had frequent applications of this kind, as well as for reviews, where judgment has been rendered on reports of referees, pursuant to a submission before a justice of the peace under the statute of 1786, c. 21 ; but we have uniformly refused such applications, on the ground that the laws authorizing reviews do not extend to such cases. The petitioner can take nothing by his petition.

Sproat for the petitioner.

JENNE, Libellant, vs. JENNE.

*** HANNAH JENNE, Libellant, versus ABNER JENNE.**

Where a libellant stated her original name to have been *Launders*, and in the copy published, to give notice to the other party, the name was written *Saunders*, the notice was held insufficient.

THIS was a libel for a divorce *a vinculo*. Upon the suggestion of the libellant that the respondent was absent from the commonwealth, notice had been ordered by publishing an attested copy of the libel and order thereon in a public newspaper.

The libellant stated her maiden name to have been *Launders*. In the copy published the name was *Saunders*.

The Court, for this variance, refused to consider the notice as sufficient to authorize them to proceed; and the respondent having been defaulted, the default was taken off, a further notice ordered, and the cause continued.

C A S E S
ARGUED AND DETERMINED
IN THE
SUPREME JUDICIAL COURT,
IN THE
COUNTY OF PLYMOUTH, OCTOBER TERM, 1810,
AT PLYMOUTH.

PRESENT:

HON. THEOPHILUS PARSONS, CHIEF JUSTICE.
HON. THEODORE SEDGWICK, } JUSTICES.
HON. SAMUEL SEWALL, }

**WILBOUR SOUTHWORTH, Plaintiff in Error, *versus* ELIJAH
PACKARD.**

A judgment of the Common Pleas will not be reversed on error, because the items of the bill of costs do not appear.

A release of damages by a husband, for the personal abuse of his wife, is a good bar to a joint action by husband and wife for the same cause.

THIS was a writ of error, brought to reverse a judgment of the Court of Common Pleas for this county, rendered upon the report of referees, appointed pursuant to the statute of 1786, c. 21.

The demand made by *Packard* against *Southworth*, which was annexed to the submission, was for "abuse done to *Packard's* wife."

The referees reported that *Packard* should recover of *Southworth*, as damage for his abuse of *Packard's* wife, the sum of 50 dollars, and all costs of prosecution accrued in consequence of the same taxed at 40 dollars 48 cents.

SOUTHWORTH vs. PACKARD, in Error.

Washburn, for the plaintiff in error, observed that there was nothing in the case to show how so large a bill of costs had arisen; and he suggested that by the "costs of prosecution," mentioned in the report, the referees meant certain expenses which had arisen in a criminal prosecution for *the same trespass, [* 96] which was a matter not submitted to their decision. He objected, too, that the wife ought to have been joined in a demand for a personal injury to her.

Curia. The objection to the bill of costs should have been made at the Common Pleas, when the report was made and the costs were taxed. We must presume them to be the regular costs of this process. As to the objection, that the wife has not joined in the demand, there may have been an injury to the wife, for which the husband was entitled to his separate action; and whether such was the fact here or not, for any species of the injury to the wife, the husband may release the damages; and the judgment complained of will be a good bar to a joint action, by husband and wife, for the same cause.

Thomas and Holmes for the defendant in error.

Judgment affirmed with costs.

EBENEZER WINSLOW, Libellant, *versus* SUSANNAH WINSLOW.

A libel for divorce cannot be sued by a guardian of a spendthrift.

THE libel in this case, which was for a divorce *a vinculo matrimonii*, for the adultery of the wife, was subscribed by a guardian, who had been appointed over the libellant, by the judge of probate, as a spendthrift.

The Court said it would be monstrous to dissolve a marriage upon such an application. It could not be known that the party ever gave his assent to the prosecution. If he is desirous of a divorce, and has sufficient ground to obtain one, he must file his libel in his own name.

Holmes for the libellant.

Libel dismissed.

***JEREMIAH CUSHMAN *versus* ELIAS CHURCHILL.**

In trespass for taking chattels, the defendant justifies under a writ of replevin. It is sufficient in such plea to allege that the plaintiff in replevin gave bond, &c., before the chattels were delivered to him.

TRESPASS for taking and carrying away a chaise and harness belonging to the plaintiff.

The defendant justifies as a coroner for this county, and sets forth a writ of replevin, directed to him, commanding him to replevy the chaise and harness, and deliver it to one *B. Shepherd*, the plaintiff in replevin, provided he give bond, &c., in common form. He then avers, that on the same day, and before the delivery of the chattels to *Shepherd*, the latter gave bond, &c., and then sets forth the service and return of the writ.

The plaintiff demurs generally to the defendant's plea in bar; and the defendant joins in demurrer.

Wood, in support of the demurrer, objected that it did not appear from the plea that the plaintiff in replevin gave the bond before the taking of the chattels by *Churchill*, which, he insisted, was necessary to the officer's justification.

Sed per Curiam. The plea is *var* is sufficient.

Eddy for the defendant.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF MIDDLESEX, OCTOBER TERM, 1810,
AT CAMBRIDGE.

PRESENT:

HON. THEOPHILUS PARSONS,	CHIEF JUSTICE.
HON. THEODORE SEDGWICK,	} JUSTICES.
HON. SAMUEL SEWALL,	
HON. ISAAC PARKER,	

SABRA CLAP, Administratrix of EZRA CLAP, *versus* JOHN COFRAN.

Though a bond, for the liberty of the jail yard, be taken for less than double the sum for which a prisoner is committed, and so is not within the statute, it is still a good bond at common law; but the debtor may be relieved against the penalty, by a judgment for the sum for which he is imprisoned.

Notwithstanding such bond, the sheriff may be charged with an escape.

Where no records of the Sessions could be found, appropriating apartments in the jail to the use of debtors, but evidence was of such an appropriation by long usage of lodging rooms for debtors, it was held an escape in a prisoner having the liberty of the yard to be out of those rooms in the night time.

THIS was an action of debt upon bond. The plaintiff, having recovered judgment against one *Jonathan Nutting*, for 578 dollars 65 cents damage, and 15 dollars and 97 cents, costs of suit, sued out her execution on that judgment, on which *Nutting* was arrested and committed a prisoner in the county jail at *Cambridge*. While thus a prisoner, and to obtain the liberty of the yard, *Nutting*, as

CLAP, Administratrix, vs. COFRAN.

principal, and the defendant, and one *Jesse Brown*, as his sureties, jointly and severally executed to the plaintiff the bond declared on in this action, in the penal sum of 1189 dollars, with a condition in due form of law.

[* 99] *The defendant pleaded three several pleas. 1. *Non est factum*, on which issue was joined, and a verdict found for the plaintiff, the defendant admitting the bond to be his deed. 2. In bar, that the bond was void, not being made pursuant to the statute, as the penalty was not in double the sum for which *Nutting* was imprisoned. To this plea the plaintiff demurred, and the defendant joined in demurrer. 3. In the third plea the escape of *Nutting* was traversed, and the issue was, whether he had or had not committed an escape.

The chief justice, before whom both the issues in the case were tried, at the last October term in this county, reported that, on the trial of this last issue, it was proved, or admitted, that the said jail, and the dwelling of the jail-keeper, were under one roof; that on the lower floor there is one room, and on the second floor two rooms, furnished with locks, bars, and grates, and which have been always used as the jail, to confine prisoners lawfully committed; that in the upper story, or garret, were chambers, which have been always appropriated as lodging-rooms for debtors in execution entitled to the liberty of the yard; that on the lower floor are two rooms always appropriated for the dwelling of the jail-keeper and his family, in which prisoners are never confined; and that the whole building is included within the limits of the yard, appurtenant to the said jail; that when *Nutting* was committed as aforesaid, the said apartments were, and ever since have been, occupied by the jail-keeper and his family, as their habitation. No record of the Court of Sessions of any of the said appropriations, was shown on the trial, but they were proved only by evidence of immemorial usage. After *Nutting* and his sureties had executed the said bond, he occupied one of the said rooms in the upper story for his chamber or lodging-room; and since that time, and before the commencement of this action, he was frequently, in the night-time, in the apartments on the lower floor, appropriated for and occupied by the jail-keeper and his family as their habitation.

[* 100] *On these facts the jury were directed, that, in law, the said *Nutting* had committed an escape, and that the plaintiff had maintained the issue on her part. But the jury found a verdict for the defendant. The plaintiff moved for a new trial, because the verdict was against law, and against the direction of the judge in a matter of law.

Ward, for the plaintiff, insisted that the evidence on the last issue

sufficiently proved an escape. As to the second plea, he contended that if the bond was not conformed to the statute, it was not for that cause void. It was not a bond for ease and favor, such a bond being always made to the officer. And the penalty, in this case, being less than the statute authorized, the defendant was not injured by the variance. He referred to the case of one *Metcalf*, in *Norfolk*, in which it had been decided that a surety could not avail himself of such a variance as this, as it was no injury either to himself or his principal.

Dana, for the defendant, was at a loss to discover that the judge had given to the jury any opinion in a matter of law. He contended that as no assignment had ever been made of apartments in the jail by the Sessions, the whole building must be considered as the prison, and equally at the service of the debtor having the liberty of the yard. It certainly was not in the jailer's power, he said, by his own act, to make a part of the house a jail, and a part not.

The cause was continued *nisi* for advisement, and at the following November term, in *Suffolk*, the opinion of the Court was delivered by

PARSONS, C. J. The action is debt on a bond, given by *Nutting*, the debtor in execution, and by *Brown* and the defendant, his sureties, to obtain for *Nutting* the liberty of the prison-yard. There are three several pleas. 1. *Non est factum*, on which it is agreed a verdict was rightly found against the defendant. 2. A plea in bar, that the bond was void, the penalty of the bond not being double the sum for which *Nutting* was imprisoned. To this plea there is a demurrer and joinder. And the plea must be adjudged *bad, unless by law a bond of this description [* 101] is prohibited or declared void.

But we know of no such law. Bonds for ease and favor are void ; but they are given, not to the creditor, but to the sheriff, to obtain from him a favor and indulgence, to which the debtor is not legally entitled. If a debtor in execution will voluntarily, without fraud, imposition, or duress, give a bond to his creditor, conditioned that he will continue a true prisoner without escaping, such a bond is not against the common law, nor against any statute. If the penalty be not double the sum, for which the debtor is imprisoned, it is not a bond within the statute of 1784, c. 41, and the debtor may be relieved against the penalty, by a judgment for the sum for which he is imprisoned ; but the bond is not void. The creditor is not obliged to take such a bond as his indemnity against an escape ; for he may, notwithstanding, charge the sheriff in an action for the escape.

It is probable that this bond was not made pursuant to the statute, for an error in computation, and not from design. Sheriffs should be careful in this respect. If the debtor give no bond to obtain the liberty of the yard, in the day-time, and the sheriff grant him this liberty, it is a voluntary escape in the sheriff. And if the bond, which the debtor gives, is not pursuant to the statute, and the sheriff, upon such unauthorized bond, grants the debtor the liberty of the yard, this will be an escape in the sheriff; for he will not be justified in granting the debtor this liberty, but upon receiving for the creditor such a bond as the statute authorizes. It is our opinion that the second plea in bar is bad.

3. The third plea traversed the escape of *Nutting*, on which issue was joined. The fact was, that *Nutting* was frequently in the night-time in the apartments appropriated for and occupied by the jail-keeper and his family as their habitation, other apartments in the same building being appropriated as a prison; the evidence of these appropriations being ancient usage, and not the records of the Court of Sessions, none of which were produced.

[* 102] * We are satisfied that this was an escape in *Nutting*, he not being in the night-time in any apartment appropriated for the use of debtors. As to the evidence from usage, it was said at the argument, that it might probably be controlled by a further inspection of the ancient records of the county court. On a new trial there will be an opportunity for this inspection; but until some record be produced, the ancient usage must be considered as legal evidence. Indeed, without such usage, there was no evidence that any part of the building, in which *Nutting* slept, had ever been appropriated to the use of debtors. The verdict is manifestly against law, as the evidence was at the trial, and must be set aside.

There is another question not necessary now to decide, as it is suggested from the second plea in bar, and not from the evidence. And it may deserve consideration whether, if *Nutting*, according to the averment in that plea, has not given a bond to the creditor pursuant to the statute, his availing himself of the liberty of the yard in the day-time be not an escape. But as this fact is not directly before us, we give no opinion as to its legal consequence.

Let the verdict be set aside, and a new trial be granted.

THE ANDOVER AND MEDFORD TURNPIKE CORPORATION
versus DAVID HAY.

Where a member of a turnpike corporation declared, at a public meeting of the corporation, that he would spend half his estate, when speaking of the expenses of making the proposed turnpike; it was held that such a declaration was no evidence of an express promise to pay the assessments on his shares, and that no action lay thereon against him for the assessments.

THIS was an action of the case against the defendant, as proprietor of four shares in the turnpike, for not paying sundry assessments, duly made by the directors of the corporation, amounting, in the whole, to the sum of 860 dollars, on the defendant's four shares. The declaration contained a number of counts, of which the sixth was as follows, *viz.* * "And, also, for [* 103] that the said *Hay*, at, &c., on, &c., in consideration that the plaintiff did then and there permit him to subscribe a certain agreement to become a member of said corporation, and be proprietor of four shares therein, whereby said *Hay* did, in fact, become a member and proprietor as aforesaid, did then and there promise the said corporation, that he would pay them all assessments which should be legally assessed by said corporation upon the said four shares, provided the same should not exceed one half the value of his estate. Now the plaintiffs aver, that since the time of subscribing said agreement, and making said promise, there have been legally assessed by said corporation, on each share therein, several assessments, amounting, in the whole, to 215 dollars, payable at several periods, all of which have long since elapsed, amounting, in the whole upon the said four shares, to the sum of 860 dollars, of all which said *Hay* has had due notice. And the plaintiffs aver, that the said sum of 860 dollars is far less than one half the estate of said *Hay*. Yet, though requested," &c.

The action was tried upon the general issue, before the chief justice, at the sittings after the last October term, in this county; and a verdict found for the plaintiffs by consent of the parties, subject to the opinion of the Court on the following case:—that the said corporation was erected by the statute of 1805, c. 14; that on the ninth day of September, in the same year, the persons named in the statute, in order to obtain associates, caused a subscription paper to be drawn of the tenor following, *viz.* "Whereas the legislature of this commonwealth, has, at the last sessions, granted leave for making a turnpike road, from near the house of John Russel, in Andover, through the west parish in Reading, thence through the town of Stoneham, near the house of David Hay, and from thence

to the market-place in Medford: *We, the subscribers, desirous of having the same completed as soon as possible, agree to take in said road the number of shares set against our names.*" That [* 104] the defendant then subscribed this *paper, and set against his name two shares; that afterwards, on the ninth of December, in the same year, at a legal meeting of the members of the corporation, the defendant added two shares more against his name; and in open meeting declared, when speaking of the expenses of making said turnpike, that if one thousand dollars was not enough, he would spend two thousand dollars, and if that was not enough, he would spend half his estate; that the said turnpike road had been duly located and made; that the sum of 860 dollars has been duly assessed on the defendant's four shares aforesaid, being less than half the value of his estate; that after due notice of the premises, the defendant has refused to pay the said assessments, or any part thereof.

If, upon these facts, so far as the Court should deem them legally admitted in evidence, the Court should be of opinion that the defendant made either of the promises alleged in the plaintiff's declaration, then the verdict was to stand; otherwise it was to be set aside, and a general verdict entered for the defendant, and judgment in either case to be rendered accordingly.

And now *Bigelow*, of counsel for the plaintiffs, thought there was a strong distinction between this case and that decided the last term in this county, between the present plaintiffs and *Gould*, (1) inasmuch as in that case there was no express promise proved. But in the case at bar, the defendant's declaration, at the meeting in December, was in effect an absolute promise to pay all assessments that should be made, and brings it within the case of *The Worcester Turnpike Corporation vs. Willard*. (2) Here was also a sufficient consideration. The enterprise labored, and the defendant was peculiarly interested in its completion, as, by the original incorporation, it was to pass near his house. The corporation were about to expend great sums of money, as they have since done, and the defendant was in consequence entitled, and is yet entitled, to his dividend of the toll on these four shares. No precise form of words is necessary to constitute a legal promise; but any declaration, showing the party's intent to perform, is sufficient. Here *was [* 105] such a declaration, which must have a construction beyond a mere acknowledgment that his shares might be sold for deficiency of payment, which was already done by the written agreement. As to the objection made at the trial, that parole evidence

(1) Vide 6 Mass. Rep. 40.

(2) 5 Mass. Rep. 80.

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was not properly admitted in the case, no principle requires that a promise made to an aggregate corporation should be in writing, more than one made to an individual; nor does the common law, nor any statute, give a superiority to a written promise over a verbal one, in a case like the present.

Dana and *Richardson*, for the defendant, contended that, as it had already been decided in *Gould's* case, that this written contract would not support an action for the assessments, the plaintiff must rely wholly on the verbal declarations of the defendant in the present case. But these declarations constituted no promise. They express, indeed, a great earnestness on the part of the defendant that the turnpike should be completed, and amount, in fact, to no more than a simple assertion, probably intended more to animate his co-partners than to have any other operation, that he had rather part with half his property than that the plan should not be carried into execution.

But if the words amount to a promise, it was a void promise, as within the statute of frauds, being a promise to pay more than ten pounds upon a contract not to be performed within a year. Neither was there any consideration for the promise. The corporation did not engage to complete the turnpike. It could make no engagement but in writing, or by its agent legally authorized. The plaintiffs have still a right, under the general statute concerning turnpikes, to sell the defendant's shares for his delinquency; and this is the only remedy the law has furnished for them. (3)

Ward, in reply. Here was clearly an understanding of the parties, that something more was engaged than the bare liability of the shares to be sold. It was understood as an express promise to pay the assessments. The contract being *executory, it [* 106] was not necessary that the corporation should make a promise contemporaneous with that of the defendant. It is sufficient, that they afterwards fulfilled the condition, on their part, to bind the defendant.

The action stood continued *nisi*, for advisement, and at the following November term, in *Suffolk*, the opinion of the Court was delivered by

PARSONS, C. J. The Court have already had before them, in the case of the present plaintiffs *vs.* *Gould*, the written instrument, signed by the several proprietors of this turnpike, to entitle them to their respective shares, and to make them members of the corporation, who now bring this suit. In that action we were satisfied that, by the terms of that instrument, the corporation could not, by law,

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maintain an action to recover damages of any proprietor for his delinquency in not paying the assessments on his shares; and that the sale of the shares of the delinquent proprietor was the only legal remedy of the corporation. We have seen no reason to change our opinion, and judgment must be rendered in favor of the defendant, unless the parole evidence of his declaration should, in law, amount to a legal contract to pay his assessments.

It appears, from the report, that the defendant originally subscribed but for two shares; and that he afterwards, at a meeting of the proprietors, added two more shares to his subscription; and in open meeting, when speaking of the expenses of making the turnpike, declared, that if 1000 dollars was not enough, he would spend 2000 dollars, and if that was not enough, he would spend half of his estate. This declaration, the plaintiffs contend, is evidence of a contract between the defendant and the corporation, amounting to an agreement with them, that, in consideration of his being permitted to subscribe for four shares instead of two, he would pay all the sums assessed on those shares, so that they should not exceed half his estate, which it is agreed they did not.

But we are satisfied that the plaintiffs cannot prevail [* 107] on * this ground. There is no evidence that the defendant made the declaration previous to his additional subscription, or that the declaration was in consequence of any permission to take more shares. The plaintiffs, therefore, fail in proving the consideration. The declaration was not reduced to writing; and if it amounted to a contract, each party must contract. But we cannot admit that a corporation can make a parole contract, unless by the intervention of some agent, or attorney, duly authorized to contract on their part. This declaration was not made to any such agent, or attorney, but in open meeting to all the corporators present. Nor can we admit that a parole declaration, made to the corporators at a corporate meeting by any individual, can amount to a contract between the individual and the corporation.

If there could be any doubt as to the legal effect of this declaration, it might be observed, that it is not to be presumed that the defendant contemplated the taking of his four shares upon terms different from those on which the other proprietors held theirs. And his declaration of the moneys he would spend, rather than the projected turnpike should fail, expresses his motive for doubling his subscription, rather than an intention to make a new contract.

Let the verdict for the plaintiffs be set aside, and a general verdict for the defendant be entered.

PHINEHAS WHITING *versus* WILLIAM SULLIVAN.

The law will not imply an *assumpsit* where there is an express promise ; nor against the express declaration of the party, made at the time of the supposed implied *assumpsit*.

ASSUMPSIT for keeping the defendant's horse. Upon the general issue pleaded, the action was tried before *Parker, J.*, from whose report it appears that the defendant had purchased the horse of the plaintiff, after a conversation between them, in which the defendant enumerated the qualities he wanted in a horse, and the plaintiff declared his horse to possess such qualities ; that after trying the horse, and being dissatisfied with him, the defendant sent the horse to the plaintiff, with a letter, in which he expressly *declared that he returned the horse to the plaintiff, [* 108] because he had been cheated in the bargain ; that the plaintiff, after reading the letter, or looking at it long enough to read it, said to the defendant's messenger, " So, Mr. *Sullivan* has sent me his horse to keep ;" that the messenger replied, " No, he has returned your horse to you, and will have nothing more to do with him ;" that a servant of the plaintiff's then took the horse and carried him to the stable, the plaintiff standing by and not forbidding ; that the saddle and bridle were brought back to the defendant ; that the horse remained about a year with the plaintiff ; and for his keeping, during that time, this action is brought.

The judge directed the jury that they might presume, from the manner in which the horse was sent back, the declaration made to the plaintiff, and his receiving the horse, connected with the conversation which took place at the time of the purchase, that the defendant had a right, after trying the horse, to return him, if he did not answer the description given of him by the plaintiff ; in which case they would find a verdict for the defendant ; but if they believed the purchase to have been absolute, without any condition, or without any right reserved to the defendant to return the horse, they might find their verdict for the plaintiff. But that, after the manner in which the horse was received by the plaintiff, they would consider whether he ought not to have sent the horse back to the defendant, or at least have notified him that he should charge him with the keeping, before he could entitle himself to keep him at the defendant's expense.

The jury returned a verdict for the plaintiff, contrary, as the judge observed, to the presumptions arising from the facts proved in the case.

The defendant objected to that part of the judge's direction, in which he instructed the jury that if they should be satisfied that the property of the horse was in the defendant at the time for which the plaintiff demands compensation for his keeping, they ought to find a verdict for the plaintiff; although, in fact, he kept the horse without any request from the defendant, and even against his express refusal to be chargeable.

And now, at this term, *Ward* and *Stearns*, of counsel for the plaintiff, being called on to support the verdict, argued that from the facts the defendant had no right to disclaim the horse; but whether he had or had not, was for the jury to decide upon the evidence, and they having settled that point in the plaintiff's favor, might well hold the defendant chargeable in this action. The property in the horse having been found to be in the defendant, in another action between these parties, the jury in this case might well presume the defendant willing to pay for his support, and on this ground they found their verdict for the plaintiff.

Bigelow, for the defendant, was stopped by the Court. And the action being continued *nisi*, the opinion of the Court was delivered at *Boston*, the succeeding November term, by

PARSONS, C. J. Upon looking into this case, it is extremely clear that the action cannot be maintained, unless upon the implied *assumpsit* of the defendant; for it is not pretended that there was any express promise by him to pay for keeping the horse. And we are satisfied that from the facts reported by the judge, the law will not imply an *assumpsit*.

As the law will not imply a promise, where there was an express promise, so the law will not imply a promise of any person against his own express declaration; because such declaration is repugnant to any implication of a promise. In this case the horse was placed in the custody of the plaintiff by the defendant, declaring that he had returned to the plaintiff his own horse; and when the plaintiff said, that the defendant had sent his horse to be kept, the defendant, by his agent, said, "No, he has sent you *your* horse, and he will have nothing further to do with him." This declaration of the defendant is directly repugnant to the implied promise supposed, and the law will not therefore imply it. In this

[* 110] *opinion our brother *Parker*, before whom the cause was tried, upon consideration of the case, fully concurs.

It was imprudent in the plaintiff to take the horse, if he was determined to hold the defendant to his bargain. Perhaps he might think the defendant's right to rescind doubtful, and might choose to keep the horse until that question was decided; and if it should be

decided against him, then he would be keeping his own horse; otherwise he might attempt to charge the defendant. On this view the plaintiff must fail; for whether the defendant impliedly promised or not, at the return of the horse, could not depend on a subsequent event. He must have impliedly promised when the horse was returned, or never after. Such a contingent agreement might have been expressly made by the defendant, but cannot be implied.

The verdict must be set aside, and a new trial granted.

LOIS HAGAR *versus* CHARLES WESTON.

The Court, on a motion for a new trial, do not inquire into the consequence of the verdict as it may relate to costs.

THIS was an action of the case in *assumpsit*, and was tried upon the general issue, October term, 1808, before *Parker, J.*; and a verdict found for the plaintiff, who, as appears from the judge's report, objected thereto, and moved for a new trial, on the ground that the jury allowed interest, on two certain papers declared upon, only from the date of the writ; the plaintiff insisting that the interest ought to have been allowed from the date of those papers; and although the difference in the amount was small, it was yet important, because the jury having returned less than fifty dollars, the plaintiff was, by the statute of 1803, c. 155, § 5, subjected to the payment of the costs of this Court; whereas, had there been no mistake in the calculation, the verdict must have been for more than fifty dollars, and in that case the plaintiff would recover her full costs.

The evidence, upon which the plaintiff rested her claim to a verdict, was, that the notes described in the several *counts were delivered to her by the defendant in dis- [* 111] charge of a demand which she had against him, but she had failed to obtain payment of them without any laches on her part; and it was testified in the case, that when the adjustment took place between the plaintiff and the defendant, the interest on the notes was calculated from their several dates, and that the defendant was allowed therefor out of the plaintiff's demand against him; and this testimony was unimpeached.

The action standing continued *nisi*, the opinion of the Court was delivered at November term, in *Suffolk*, by

PARSONS, C. J. It was within the discretion of the jury to assess the damages. They allowed interest on the money received from the date of the writ; and as the facts are stated, it appears to us equitable that interest should have been allowed from the negotiation of the notes. This the jury have not done, probably through inattention. But we cannot say that the verdict is against law or against evidence.

The plaintiff's counsel, when the verdict was returned, and before it was recorded, should have made inquiry whether the jury had considered this point or not. If they had, the Court would not have interfered; if they had not, the Court would have sent them out to consider it. But as this was not done, until after the verdict was made a record of the Court, it is now too late for us to interfere.

It appears that, had interest been allowed by the jury from the negotiation of the notes, the plaintiff would have been entitled to full costs, which she cannot now have. We do not inquire into the consequences of verdicts, as they may relate to costs. The costs are regulated by the verdict, and not the verdict by the costs.

The plaintiff can take nothing by her motion for a new trial

Bigelow for the plaintiff.

Ward for the defendant.

[* 112]

* ABEL BOYNTON *versus* JOHN HUBBARD.

A contract made by an heir to convey, on the death of his ancestor, living the heir, a certain undivided part of what shall come to the heir by descent, distribution, or devise, is a fraud upon the ancestor, productive of public mischief, and void as well at law as in equity.

THE declaration in this case was in a plea of *covenant broken*; in which the plaintiff declares on a deed executed by the defendant, whereby, for a valuable consideration therein expressed, the defendant covenanted that, if he should survive *Tuthill Hubbard*, he would pay over and convey to the plaintiff, his heirs, executor, and administrators, one third part of all the estate, real and personal, which might descend to the defendant from the said *Tuthill*, as an heir to him; that the defendant survived the said *Tuthill*, who died intestate, and from whom a large estate, real and personal, descended to the defendant, who has come to the possession thereof; that

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thereupon the plaintiff requested him to pay and convey one third part thereof to him, which the defendant has refused to do, and so has broken his covenant, to the plaintiff's damage 25,000 dollars.

The defendant prays oyer of the deed declared on, and it is read to him in these words, viz. "This indenture, made and concluded between *John Hubbard*, of *Broadalbin*, in the county of *Montgomery*, and state of *New York*, of the first part, and *Abel Boynton*, of the city of *Schenectady*, and state aforesaid, of the second part, *witnesseth*, that whereas the said party of the first part is the nephew of, and heir expectant to one *Tuthill Hubbard*, of *Boston*, in the state of *Massachusetts*, as likewise nephew of, and heir expectant to one *Elizabeth Patridge*, of *Boston* aforesaid, widow, sister to said *Tuthill Hubbard*, and should he survive, the said *John Hubbard* is the person to whom the estate of the said *Tuthill* and the said *Elizabeth*, in all probability, will descend. And whereas the said party of the second part is willing to make advances of money to, and otherwise assist the said party of the first part, he agreeing in some manner to remunerate him out of the said estate, or estates, should the same so descend to him upon the death of the said *Tuthill* or *Elizabeth*. Now, know all men by these presents, that I, the said *John Hubbard*, * in considera- [* 113] tion of the sum of four hundred and fifty dollars, to me paid by the said *Abel Boynton*, the receipt whereof I do hereby acknowledge, and for divers other good considerations, do bind myself, my heirs, executors, and administrators, in case I should survive the said *Tuthill Hubbard*, or the said *Elizabeth Patridge*, and become heir, by will or otherwise, to the estate of the said *Tuthill*, or the said *Elizabeth*, or any part thereof as aforesaid, to pay over, or cause to be conveyed to the said *Abel Boynton*, his heirs, executors, and administrators, one third part of all the lands, tenements, hereditaments, goods, chattels, or effects, whatsoever, that now has, may or shall descend to me, the said *John Hubbard*, in manner aforesaid, as heir to the said *Tuthill Hubbard*, and said *Elizabeth Patridge*, as soon as I, the said *John*, can obtain possession of the same by due enforcement of law; and the said *Boynton* is to receive in this proportion of all property, of every name and nature, that I may receive, possess, or be entitled to, in manner aforesaid, or that I may in any way or manner receive, as heir to said *Tuthill* and *Elizabeth*, by settlement, agreement, or compromise. In witness whereof, I have hereunto set my hand and seal, this fifteenth day of July, in the year of our Lord eighteen hundred and seven." And thereupon the defendant pleads that he ought not to be charged with any breach of the covenants contained in the said writing, because he says that the same was obtained by the fraud

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and imposition of the plaintiff, and so the same is not his deed; and thereof he puts himself on the country. This issue being joined by the plaintiff, was tried by a jury, who found a verdict for the plaintiff, and assessed his damages at 2000 dollars.

The defendant thereupon moved in arrest of judgment, on the ground that the deed declared on is void, as against the general policy of the law.

The plaintiff also moved for a new trial, because the damages were too small. This motion of the plaintiff was to be decided, not upon the report of the evidence by the [* 114] * judge, but upon certain facts agreed by the parties, viz. that the said *Tuthill Hubbard* died intestate leaving an estate worth 300,000 dollars; that the defendant was entitled, as a co-heir, to one sixth part thereof; and that the plaintiff had required him to transfer one third part of his share, which he had refused to do.

But the plaintiff not waiving his right to a review, his motion for a new trial was afterwards withdrawn; and the only motion remaining for decision was that made by the defendant to arrest the judgment.

This motion was argued at the last term in this county, by *Otis* and *Bigelow* for the defendant, and *Ward* and *Dana* for the plaintiff.

In support of the motion, it was urged that no action at law lies on such a contract; and although the remedy in *England* is usually sought in chancery, yet there the contract is held void when fraud appears, or the consideration is exorbitant, or grossly inadequate, or where an imposition is practised upon a necessitous man. (1) It is plain, from the facts in this case, that the defendant was in necessitous circumstances. For 450 dollars he sells his expectancy of 16,666; more than thirty times the amount of the money paid; and this exclusive of his further expectations from the estate of *Elizabeth Patridge*, which may be equal in amount.

Nothing can be more impolitic, or more mischievous in its tendency and effects, than permitting heirs to sell their expectancies. (2) Parents must be uncertain whether their children are to receive benefit from their estates; children will lose their sense of dependence, and the respect they owe to their parents; the very foundations of all domestic government will be undermined; and the effect of this will be most deplorable upon the state of public morals. Young heirs will be encouraged in extravagance and disobedience

(1) 3 *P. Will.* 290, *Cole vs. Gibbon*. — *Ibid.* 292, in *notis*, *Curwyn vs. Milner*.

(2) 1 *Fonblanque*, 124. — 2 *Vern.* 27, 121, 346.

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on one hand, and on the other avarice, fraud, and imposition, will be supported and countenanced.

If it should be said that it was uncertain whether *Tuthill * Hubbard* would die possessed of so large an [* 115] estate, and so the bargain was not unconscionable, it may be answered that only eight months passed from the date of the contract to the commencement of this action; a term in which it is impossible to presume this great estate to be acquired. If it had been so acquired, it was for the plaintiff to show it.

In the case of *Jones vs. Roe*, (3) Lord *Kenyon*, speaking of the possibility which an heir has from the courtesy of his ancestor, says expressly that such a possibility is not the object of disposition; for if the heir were to dispose of it during the life of the ancestor, though it afterwards devolved on him from his ancestor, such disposition would be void.

It is acknowledged that, in cases of this kind, chancery decrees a return of the money paid. But that fact has no bearing on the present question of arresting the judgment. The plaintiff may bring his action for the money he advanced the defendant, with interest, &c. (4) If he should fail of recovering in such action, it was his folly to make a catching bargain of this kind.

This contract was in fact a wager upon the defendant's surviving either of his relatives. And in this view it was most exorbitant in its terms. As a wager, too, it is against the policy of the law in this country. (5) If mercantile wager policies are discountenanced, the reasons are much stronger against such a one as this. The *English* courts will not sustain an action upon a wager, the ground of which is an immoral or indecent transaction, or which involves a question, by which the peace or character of others may be affected; (6) both which grounds apply in the present case.

Further, if such a contract is good, where the party has expectations, it will be good in case of a stranger; and thus usury may be practised under cover, and the vilest advantages taken of heedless and necessitous young persons.

For the plaintiff, it was insisted that a contract of the kind declared on is valid by our law, unless actual fraud *be shown, which is negatived by the verdict, and is [* 116] not here pretended. The parties had a right to make their own bargain, and the plaintiff has also a right to a legal remedy

(3) 3 D. & E. 93.

(4) 1 P. Will. 310, *Griffith vs. Twistleton*. — 1 Wils. 320, *Baugh vs. Price*. — *Cases Temp. Talbot*, 111, *Proof vs. Hines*.

(5) 2 Mass. Rep. 1, *Amory vs. Gilman*.

(6) *Coop. 729, Dacosta vs. Jones*.

for enforcing it. The authorities cited for the defendant are all in Chancery. This Court constantly disclaims the exercise of chancery powers, except so far as particular statutes have conferred them; and until a statute authority is given, they cannot relieve against bargains fairly made, without fraud or imposition, however hard the terms of such bargains may be. In chancery all the circumstances of the contract would be investigated, in which case it might appear that 450 dollars did not form the whole consideration, but that the "divers other good considerations," mentioned in the deed, had great weight. In chancery, too, if the contract was vacated, the money paid would be restored with interest and costs, where there was no fraud. They, who ask for equity, must do equity. But it is doubtful, in this case, whether the plaintiff can have any remedy at law for the money he has advanced.

This is not a naked grant of a possibility, but a covenant to convey a possibility, after it shall come into possession, which is good in equity. (7)

The policy of the *English* law is very different from that of ours. There the eldest son is the sole heir. This naturally produces a dissolution of manners, which needs restraint. But, even in *England*, chancery has not gone so far as to declare all *post obit* contracts void. On the contrary, Justice *Burnett*, while delivering his opinion, in the case of *The Earl of Chesterfield vs. Jansen*, (8) says, "If the court should lay it down as a general rule, that in no case whatever a young heir shall borrow money, who has a cruel and avaricious father, he might starve in a *desert* with the land of *Canaan* in his view; but contracts with them must be honest and fair," &c.

The policy of our own law, on the contrary, is to divide inheritances to the extremest length; the youngest daughter inherits both real and personal estate equally with the [* 117] *eldest son. There is, therefore, less reason to guard against contracts of this kind here than in *England*.

This was no more a wager than a policy of insurance upon interest. Here was a valuable and satisfactory consideration paid for a covenant to convey property, which was in expectancy; and the defence, attempted to be maintained in this action, savors more of fraud and imposition in the defendant than any circumstances of the plaintiff's conduct, which appear in the original transaction.

The action stood over to this term, and being continued *nisi*, the opinion of the Court was delivered at the November term following in *Boston*, by

(7) 1 *Fonblanque*, 202.(8) 1 *Wils.* 293

PARSONS, C. J. The plaintiff's counsel have insisted that *post obit* contracts are not void, as against the policy of the law; and that they are not to be relieved against in equity, if made without fraud or imposition; that in this case the verdict has negatived any fraud or imposition; (a) and, therefore, that equity would not relieve, unless an advantage was taken of the necessity of the heir by the plaintiff; and then the heir is relieved on the equitable condition of his repaying the consideration money with interest; that the question before the Court is a question at law, and ought not to be decided upon principles by which courts of equity are governed; and that if it was so, judgment ought not to be arrested, because then the plaintiff would lose the consideration and interest, which equity would give him.

On the other side, the defendant's counsel have strongly insisted that a contract of the description of that before the Court is void at law; being repugnant to principles of public policy, as destructive of family interests, and of the necessary dependence and subordination of children to a parent, or of the heir to his ancestor.

The cases cited by both parties in this cause, as well as those into which we have looked, have been chancery decisions; and, therefore, it is supposed by the plaintiff's counsel that they are not authorities to influence the determinations to be made by a court of law.

*This position cannot be admitted as universally true. [* 118] Chancery, from the nature of its jurisdiction and powers, may grant specific remedies for wrongs, not within the reach of a court of law. But when the proceedings in equity are founded upon principles of public policy, that same policy ought to prevail in courts of law; that the measure of right may be the same in each court, although the remedies for a violation of right may be different. And we do not recollect a contract, which is relieved against in chancery, as originally against public policy, which has been sanctioned in courts of law, as legally obligatory on the parties. For although it has been said in chancery, that marriage brokerage bonds are good at law, but void in equity, yet no case has been found at law, in which those bonds have been holden good. And we are satisfied that when chancery has relieved against a contract on principles of public policy, those principles ought to

(a) [Fraud and imposition in obtaining the execution of the instrument only, such as misrepresentation of the contents of it, for instance, could be given in evidence on the plea of *non est factum*. — *Balden vs. Davies*, 2 Hall. 433. — *Vrooman vs. Phelps*, 2 Johns. 177. — *Dorr vs. Munsell*, 13 Johns. 430. — *Franchot vs. Leach*, 5 Cowen, 306. — *Jackson vs. Hills*, 8 Cowen, 290. — *Edwards vs. Hoskins*, 1 Tyrw. 182. — *Gill vs. 162*. — *Harmer vs. Rowe*, 6 M. & S. 146. — Ed.]

have their full weight in courts of law ; although, to attain justice, the remedy must be according to the course of the common law. (b)

Arguments drawn from considerations of public policy, have, and ought to have, great weight, both in equity and at law. As fraud may be a public mischief as well as a private wrong, in both cases equity will relieve against it ; and I know not that in any case the law will give it a sanction. In a fraudulent contract, deceit may be practised on a party to the contract ; in which case neither at law nor equity is he bound by such contract. Or the deceit may not be on either party to the contract, but on third persons ; and if the deceit on third persons will operate as a public mischief, neither equity nor law will support the contract.

Thus marriage brokage bonds, which are not fraudulent on either party, are yet void, because they are a fraud on third persons, and are a public mischief, as they have a tendency to cause matrimony to be contracted on mistaken principles, and without the advice of friends ; and they are relieved against as a general mischief, for the sake of the public.

[* 119] * Upon this principle bargains to procure offices are rescinded, not on account of fraud on either of the parties ; but for the sake of the public, because they tend to introduce unsuitable persons into public offices.

Another case, where the deceit is upon persons not parties to the contract, is a deceit on a father or other relation, to whom the affairs of an heir, or expectant, are not disclosed ; so that they are influenced to leave their fortunes to be divided amongst a set of dangerous persons and common adventurers, in fact, although not in form. This deceit is relieved against as a public mischief, destructive of all well-regulated authority or control of persons over their children, or others having expectations from them ; and as encouraging extravagance, prodigality, and vice. (9)

From the forms of proceeding in courts of equity, it must be admitted, that these principles may often be more correctly applied there than in courts of law. Chancery may compel a discovery of facts, which a court of law cannot ; and from facts disclosed, a chancellor, as a judge of facts, may infer other facts, whence deceit, public or private, may be irresistibly presumed. Whereas at law fraud cannot be presumed, but must be admitted or proved to a jury.

(b) [The learned judge seems to have entirely mistaken the principles upon which courts of equity grant relief, (*Evans vs. Bicknell*, 6 Ves. 184, 185, 186,) as well as the rules of the common law — Ed.]

(9) 1 Atk. 351, 352, 353, *Chesterfield & Al., Executors, vs Iansen*

But when a court of law has regularly the fact of fraud, admitted or proved, no good reason can be assigned why relief should not be obtained there; although not always in the same way in which it may be obtained in equity. (c)

A case, in which an heir or expectant is frequently relieved against his own contract, is a *post obit* bond. This is an agreement, on the receipt of a sum of money by the obligor, to pay a larger sum, exceeding the legal rate of interest, on the death of the person from whom he has some expectation, if the obligor be then living. This contract is not considered as a nullity; but it may be made on reasonable terms, in which the stipulated payment is not more than a just indemnity for the hazard. But whenever an advantage is taken of the necessity of the obligor, to induce him to make this contract, he is relieved, as against an unconscionable *bargain, on payment of the principal and interest. [* 120] This contract may be made on *data*, whence its reasonableness may be ascertained; for the lives of the obligor, and of the person on whose death the payment is to be made, are subject to be valued, as is done in insurances upon lives. But the covenant declared on, in the case at bar, is not in the nature of a *post obit* contract.

Another case, in which an heir is relieved, is when he is entitled to an estate in reversion or remainder, expectant on the death of some ancestor or relative, and he contracts to sell the same for present money. All these cases are not relieved against as fraudulent; because a reasonable and sufficient consideration may be paid, as ascertained by the annual value of the estate, and of the intervening life. But as in *post obit* contracts, when an advantage is taken by the purchaser of the necessity of the seller, he will be relieved against the sale, on repaying the principal and interest, and sometimes paying for reasonable repairs made by the purchaser. This relief is granted on the ground that the contract of sale was unconscionable.

In unconscionable *post obit* contracts, courts of law may, when they appear, in a suit commenced upon them, to have been against conscience, give relief by directing a recovery of so much money only, as shall be equal to the principal received and the interest. (d) But in sales of remainders and reversions, by grants executed, I

(c) [A court of law grants no relief in these cases of constructive fraud; but only in such cases of actual fraud as render the contract or transaction void, or a nullity. — Ed.]

(d) [Courts of law can grant no equitable relief in such case. If the contract be not absolutely void, they can only enforce it according to its terms; and if it be void, they must disregard it *in toto*. — Ed.]

know of no relief that courts of law can give, unless the grants shall appear to have been fraudulently obtained of the grantor; in which case the fraud will vitiate and render null the grants so infected.

The contract before us is not a sale of a remainder or reversion; but is different from any noticed in the reports that have been cited. There is one case of a contract between presumptive heirs, respecting their expectancies from the same ancestor. It is the case of *Buckley vs. Newland*. (10) The parties had married two sisters, presumptive heirs of Mr. *Turgis*. The husbands agreed [* 121] that whatever should be given by Mr. *Turgis* should be equally divided between them. After *Turgis's* death, the defendant, who had the greater part given to him, was compelled to execute the agreement. The reciprocal benefit of the chance was a sufficient consideration. The tendency of the agreement was to guard against undue influence over the testator; and it could not be unreasonable to covenant to do what the law would have done, if *Turgis* had died intestate.

The covenant declared on, in the case at bar, is an agreement by an heir, having two ancestors then living, an uncle and an aunt, that if he survive them, or either of them, he will convey to a stranger one third part of all the estate, real and personal, which shall come to him from those ancestors, or either of them, by descent, distribution, or devise. And it is found by the jury, that this contract was not obtained from the heir by the fraud of the purchaser. If, therefore, this covenant is void, it must be on the principle, that it is a fraud, not on either of the parties,—for that the jury have negatived,—but on third persons, not parties to it, productive of public mischief, and against sound public policy. If the contract has this effect, it is apparent to the Court from the record; the whole contract being a part of the record. And that a contract of this nature has this effect, we cannot doubt.

The ancestor, having no knowledge of the existence of the contract, is induced to submit his estate to the disposition of the law, which had designated the defendant as an heir. The defendant's agreement with the plaintiff is to substitute him as a co-heir with himself to his uncle's estate. The uncle is thus made to leave a portion of his estate to *Boynton*, a stranger, without his knowledge, and consequently without any such intention. This Lord *Hardwicke* calls a deceit on the ancestor. And what is the consequence of deceits of this kind upon the public? Heirs, who ought to be under the reasonable advice and direction of their ancestor, who has

no other influence over them than what arises from a fear of his displeasure, from which fear the heirs *may be induced to live industriously, virtuously, and prudently, are, with the aid of money speculators, let loose from this salutary control, and may indulge in prodigality, idleness, and vice; and taking care, by hypocritically preserving appearances, not to alarm their ancestor, may go on trafficking with his expected bounty, making it a fund to supply the wastes of dissipation and extravagance. Certainly the policy of the law will not sanction a transaction of this kind, from a regard to the moral habits of the citizens.

But when it is considered that a contract of this kind is a mere wager, in a case where there are no principles, by which the value of the chances may be estimated, so as to ascertain whether it be unconscionable or reasonable; and, therefore, if valid in any case, it may be valid in all cases; public policy has additional inducements to discountenance it, as dangerous to good faith and fair dealing.

That such is the nature of this contract, is manifest by considering the terms of it. It is true the comparative value of the lives of the uncle and nephew may be estimated. But there is no rule for estimating the estate which the uncle may leave. After the contract he may be unfortunate and lose his property; or he may acquire a much larger estate. But if the estate, of which he should die seised and possessed, could be known, what is the rule for calculating whether he will die intestate or not? or if he should make a will what estate he would devise to the nephew? the nephew, when the contract is made, may be a co-heir; and afterwards the other co-heirs may die, leaving him the sole heir. Without pursuing the nature of the contract further, it is most manifest, that it must be a desperate wager on one side or the other; and, as such, ought not to be countenanced, as the foundation of an action.

It is, therefore, our opinion, that this contract by an heir to convey, on the death of his ancestor, living the heir, a certain undivided part of what shall come to the heir by descent, distribution, or devise, is a fraud on the ancestor, productive of public mischief, and void as well at law as in equity. (e)

* Believing this contract void at law, we cannot treat it [* 123] as an unconscionable bargain, in which the plaintiff may recover as damages the money he has paid, with the interest. Nor do we decide that the plaintiff cannot, in another action, recover

(e) [The learned judge seems not to have adverted to the distinction between constructive fraud, which vitiates contracts in equity, and actual fraud, which renders them void at law. — Ed.]

back that money, with the interest, as money paid, not fraudulently, but fairly, on a consideration which has failed.

The judgment must be arrested, and the defendant recover his costs. (11) (f')

(11) See 1 D. & E. 732, *Shove vs. Webb*. — 6 East's Reports, 241. *Scurfield vs. Gossland*.

(f') [The contract was undoubtedly good at the common law, and voidable only in a court of equity. — Ed.]

AMOS BOND *versus* THOMAS W. WARD, Sheriff of Worcester.

Where a sheriff has reason to doubt whether goods are the property of a debtor, he may insist on the creditor's showing them to him, and also on being indemnified for any mistake he may make, in conforming to the creditor's direction, either in attaching such goods, or in seizing them upon execution. But if he, without making such claim, undertakes to execute the precept as well as he can, he is answerable for not attaching the debtor's goods when in his power, if the creditor be injured by his neglect.

If the goods of a stranger are in the possession of a debtor, and so mixed with the debtor's goods, that the officer, on due inquiry, cannot distinguish them, the owner can maintain no action against the officer for taking them, until notice, and a demand of his goods, and a refusal or delay of the officer to redeliver them.

Goods which cannot be returned in the same plight, as hides in vats for tanning, are not liable to attachment.

THIS was an action of the case against the defendant, for the negligence and misfeasance of *William Caldwell*, his deputy. Upon a trial had before the *chief justice*, at the sittings after the last October term, in this county, upon the general issue, a verdict was found for the plaintiff, by the consent of the parties, subject to the opinion of the Court upon a case stated; it being agreed that the verdict might be amended or set aside, as the opinion of the Court should be upon the facts in the case.

It appears, from the case, that the plaintiff sued his writ against one *Daniel Goulding*, upon which he afterwards recovered the judgment alleged in the declaration;—that the writ was duly directed and delivered to the deputy to be served, with an endorsement thereon, not signed, of the following tenor: "Mr. Officer, take property sufficient to secure the debt;"—that [* 124] when the writ was delivered to the *deputy, which was on Saturday evening, the fifteenth day of September,

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1807, he was directed to attach personal property sufficient to secure the debt, if he could find enough; if not, attach real estate, so as to make the debt secure;—that the deputy, after expressing his doubts whether sufficient real and personal estate could be found, *took the writ, saying he would attend to the business immediately, and would secure the debt, if it were possible*;—that in the afternoon of the next Monday, the deputy went to *Goulding's* house to attach personal estate, and was admitted;—that *Goulding*, being by trade a tanner, had a number of hides in his vats to tan, and he proposed to the deputy to attach them, and to take a lease of the vats until the hides should be tanned, to which proposition the deputy agreed;—that *Goulding* had in his house furniture liable to attachment, worth 100 dollars, but the same was mixed with furniture belonging to some women, some of whom were then in the house;—that the same deputy then had another writ against *Goulding*, at the suit of a Mr. *Heywood*, but received after the plaintiff's writ;—that after he had agreed to attach the hides, he left *Goulding's* house, with *Heywood*, to attach on his writ some cattle, hay, and husbandry tools, which were worth, deducting all charges of attaching, keeping, and selling, one hundred and fifty dollars;—that he attached the same for *Heywood*, who showed them to him, he having before no knowledge of them; but by reasonable inquiry he might have discovered and attached them upon the plaintiff's writ on Monday morning, before he received *Heywood's* writ;—that the deputy then returned to *Goulding's* to attach the hides, but in the mean time another deputy had attached them for other creditors, taking a lease of the vats, having them afterwards tanned, and selling them on other executions, the net proceeds of which, deducting the expense of tanning, and all other charges, amounted to 517 dollars 65 cents;—that if the deputy had tarried at *Goulding's* to attach the hides, and take a lease of the vats, he could not afterwards, on the same day, have gone and *attached the chattels which he did attach at [* 125] *Heywood's* suit;—that the attaching of the hides, and taking them from the vats into the deputy's custody, would have materially damaged them;—and that he had, in fact, made no attachment of any estate of *Goulding's* at the plaintiff's suit, and the plaintiff's execution against him is wholly unsatisfied, although duly issued and delivered to the deputy.

The counsel for the plaintiff contended that it was the duty of the deputy sheriff to attach the hides, all movable property being liable to be seized in execution, and therefore to be attached on mesne process, except those exempted by the statute of 1805, c. 100. The attaching of hides in vats is so customary here, as to

have become, in a manner, the common law of the country. Whatsoever may be distrained for public taxes, may be attached for debt; but the legislature do not exempt hides in vats, nor, indeed, any articles as perishable, from distress for taxes. It is very difficult to draw a line between articles perishable and those not so. Indeed, very little injury arises to hides from suspending the process of tanning. It is a ruling principle, in the policy of our country, to provide for the payment of debts; and to this almost every other consideration is made to yield. Thus lands are subject to be taken in execution, and the fee transferred by the act of law from the debtor to the creditor; other rights in land, as equities of redemption, are sold for cash at auction, as are all chattels; so that any arguments drawn from the common law respecting distresses, which was attempted at the trial, apply with very little weight here. It is also to be considered that in this state, and especially in the country, a very great proportion of the personal property of the citizens is in a state in which it will be injured by long keeping, as provisions, and all articles in the hands of manufacturers.

It was argued *for the defendant*, that the deputy sheriff having committed no fault, the defendant ought to have had a verdict in his favor; that the deputy had no indemnity from the [* 126] plaintiff, nor any direction to attach any particular * chattels, and, therefore, was not obliged to expose himself to any hazard by making a special attachment. As to the furniture in *Goulding's* house, it was mixed with other furniture, and had no mark by which the deputy could distinguish it. The goods attached on *Heywood's* suit were unknown to the officer, and he was not obliged to discover them; *Heywood* having found them, he had a right to have them attached on his suit; and as to the hides, the deputy was not obliged to hire the vats, and turn tanner. (1)

The cause stood over *nisi*, and at the following November term in *Suffolk*, the opinion of the Court was delivered by

PARSONS, C. J. (after giving a summary of the facts, and of the several objections made by the defendant's counsel.) We shall consider these objections in their order, after making some observations on the duty of an officer having a writ to serve.

And it is our opinion, that when there is any reasonable ground to induce an officer to believe, that in making an attachment, or in seizing upon execution, he may mistake, and expose himself to an action for damages, by attaching or seizing goods not the property of the debtor, he may insist on the creditor's showing him the

(1) *Dalt. Sheriff*, 145. — 5 *Mass. Rep.* 157, *Lane & Al vs. Jackson*. — *Ibid.* 271, *Watson & Al. vs. Todd & Al.* — *Cro. Eliz.* 783, *Duncomb vs. Reeve & Al.* — 2 *Mod.* 61, *Wilson vs. Duckett*. — *Vin. Abr. Distress*, H pl 7, 41.

debtor's goods, and also on being indemnified for any mistake he may make in conforming to the creditor's directions. (a)

But we are also satisfied, that if the officer does not request the creditor, his attorney or agent, to show him the debtor's goods, or to indemnify him; but agrees to execute the precept of the writ as well as he can, he is answerable to the creditor, if he does not attach the debtor's goods, which he might have found and attached; if the creditor be injured by his neglect.

Now, in the case at bar, the deputy sheriff did not request the plaintiff, or his agent, to show him the debtor's goods, or to indemnify him; but expressly declared, on Saturday evening, that he would attend to the business immediately, and secure the debt, if it were possible. He therefore took *on him- [* 127] self the discovery and attachment of sufficient effects of the debtor, if practicable. *Goulding's* furniture was in his actual possession, in his dwelling-house; he ought, therefore, to have attached that furniture; and if he had attached some furniture of other persons, which was in *Goulding's* house, and mixed with his, when the right owner claimed his part, the deputy sheriff might have restored it, without subjecting himself to an action by the plaintiff. And if the goods of a stranger are in the possession of a debtor, and so mixed with the debtor's goods, that the officer, on due inquiry, cannot distinguish them, the owner can maintain no action against the officer, until notice and a demand of his goods, and a refusal or delay of the officer to redeliver them. It is, therefore, our opinion that the defendant is answerable for the neglect of his deputy in not attaching the debtor's furniture.

The effects attached on *Heywood's* writ were discovered and shown to the officer by him; and if the officer, using due diligence and making all reasonable inquiry and search, would not have been able to discover them, until after *Heywood* had made the discovery and shown them to the officer, to be attached at his suit, we should be strongly inclined to believe that the officer would be protected against the payment of damages, for giving the preference to *Heywood's* writ in his attachment of these goods. But the officer undertook to attend to the business immediately; and it is agreed that if he had, he might have discovered and attached these goods on Monday, before he received *Heywood's* writ. He was therefore

(a) [If the attachment be clearly unlawful, no promise or agreement to indemnify him will be of any avail; and if it be doubtful, it seems that if the sheriff be requested to make the attachment, an agreement to indemnify him will be implied. — *Humphreys vs. Pratt*, 2 Dow & Clark, 288. — *Fletcher vs. Harcott*, Hutton, 55. — *Battersea's Case*, Winch. 48. — *Betts vs. Gibbins*, 2 Ad. & E. 57. — *Adamson vs. Jarvis & Bing*, 72 — Ed.]

guilty of a neglect in not making an attachment, which is to the plaintiff's prejudice; and in our opinion, the defendant must answer.

The not attaching the hides in the vats of *Goulding*, deserves a distinct consideration. The sheriff is not answerable for any default of his deputy, unless it be a default in executing the powers lawfully derived from the authority of the sheriff, under which his deputy acts. For where a deputy undertakes any business [* 128] not resulting from the duties of his office, the sheriff is not responsible; for, in this respect, he is not the deputy of the sheriff. How far the deputy was guilty of laches in his office, in not attaching the hides, is the remaining question.

The practice of attaching the effects of a defendant, and holding them to satisfy a judgment, which the plaintiff may recover, when, perhaps, judgment may be for the defendant, is unknown to the common law, and is founded on our statute law, explained by a usage founded in the ordinances in force under the colonial charter.

At common law an attachment, as part of the service of process in a civil suit, is a species of distress, in which the effects attached were the ancient *vadii* or pledges. (2) When the defendant did not appear on a summons to answer to the plaintiff, an attachment issued, and his chattels were seized by the sheriff to compel his appearance; but when he had appeared, he was entitled to his chattels in the same plight in which they were attached; if he did not appear, but made default, the chattels attached were forfeited.

By the statutes now in force, there is no express provision that an attachment may go before a summons; but the form of a writ of attachment against the goods and estate is prescribed as an original process, and the attachment of goods and estate, by virtue of such process, is recognized, and the sheriff is obliged to hold them attached until judgment; and for thirty days after, if the plaintiff have judgment, that the estate attached may be applied to satisfy his judgment. (3)

However, by the colonial ordinances, (4) it was ordered that it should be at the liberty of every plaintiff to take out either a summons or an attachment against the defendant. But under the colonial charter, the attachment was for some time merely a distress, to compel an appearance and an answer; and when the duty was performed, the distress was returned. Afterwards an ordinance passed, (5) which, reciting as an inconvenience of re-

* 129] leasing the goods attached * on the appearance of the

(2) *Gilb. Law of Distresses*, 24

(4) *Colony Laws*, page 7.

(3) *Stat.* 1784, c. 28.

(5) *Ibid.* 144

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party, that the plaintiff when recovering judgment might not find them to seize on execution, ordered that the attachment should remain until the judgment was satisfied, provided the execution was sued out and executed in one month after judgment. This practice was sanctioned by the provincial act of 13 *Will.* 3, c. 11, and is now law by the statutes in force.

But what goods might be the subject of attachment, or distress, must be determined by the common law; no direction on this point being given by any statute. At common law all distresses, as well those to compel appearance as to perform any other duty, must, when the duty is performed, be restored in the same plight in which they were taken. For this reason, goods could not be distrained which, in consequence of the distress, could not be returned in the same plight in which they were taken; as sheaves of corn, or hay, in a cock or barn; because they would be injured, as the grain of the sheaves would be shattered. But the sheaves or hay in a cart might be distrained in the cart, because by removing them with the cart no damage might happen to them. (6)

From the application of this maxim to green hides in vats, it is manifest that such hides could not be distrained, as they would be materially injured by being removed; and if the defendant should recover judgment, they could not be returned to him in the same plight in which they were taken from him. The deputy sheriff was therefore guilty of no laches in not attaching and removing the hides from the vats.

But the plaintiff's counsel has argued that he might have permitted them to remain in the vats until tanned, as the debtor offered him a lease. The deputy was not, however, by the duties of his office, obliged to take a lease, or to cause the hides to be tanned. Without the debtor's consent he could not lawfully do it; and with his consent he would have acted by authority derived from the debtor, and not from the sheriff; and the sheriff is not responsible, because *his deputy did not do what by [*130] law he was not obliged to, unless under color of his office he does what the law prohibits. We are, therefore, of opinion that the defendant is not answerable to the plaintiff, because the deputy sheriff did not attach the green hides in the vats.

In the argument the plaintiff's counsel have compared the attaching of these hides to the attaching of perishable articles, or of live cattle, which, it was contended, might lawfully be attached. There is no direct analogy between the cases; for goods perishable in their nature, may not perish until after judgment, and certainly they may

(6) *Gilb Law of Distresses*, 34, 5.

not be injured by the mere attaching and removing of them. The same observation applies to live cattle. But if the articles in fact perish from their intrinsic nature, or the officer is at expense in sustaining the cattle, on whom the loss shall fall, or by whom the expense shall be reimbursed, are questions to be settled when they are regularly before us.

In the case of *Proctor vs. Rice*, in *Middlesex*, where the defendant had recovered judgment, and the chattels attached were returned, he was allowed to maintain trover against the plaintiff, and recover the damages sustained by the temporary loss of the goods attached, according to the injury he had suffered by that loss. (b)

But inconveniences may result, and certainly have resulted, from our practice of attachments, where the suit has been pending a long time, whether the plaintiff or defendant has prevailed; and these inconveniences have been greater, when the goods attached have been live cattle or perishable wares. If the legislature were to authorize the defendant to dissolve the attachment, on giving security to the value of the goods attached, as is the case at common law; or if the defendant refused to authorize the officer to sell them, and retain the proceeds subject to the attachment, these inconveniences might be avoided. On the wisdom or expediency of such provisions, the legislature must determine.

The value of the furniture, which the deputy of the [* 131] defendant * might have attached, is agreed to be one hundred dollars, and the value of the goods attached on *Heywood's* suit is stated in the case to be one hundred and fifty dollars. On these two sums interest is to be computed from the return day of the plaintiff's execution against *Goulding* to this time; and the amount must be inserted in the verdict instead of the sum there found; and on the verdict thus amended the plaintiff is to have judgment.

Dana for the plaintiff.

Bigelow and *F. Blake* for the defendant.

(b) [It has been decided that no action will lie in such case unless the original action, on which the attachment was made, was malicious and without probable cause.—*White vs. Dingley*, 4 Mass. 433.—*Lindsay vs. Learned*, 17 Mass. 190—*Stone vs. Swift*, 4 Pick. 392.—*Pierce vs. Thomson*, 6 Pick. 193.—Ed.]

EBENEZER APPLETON *versus* WILLIAM BOYD.

Where land is conveyed to two in mortgage, as collateral security for a joint debt, it is holden in joint tenancy, notwithstanding the statute of 1785, c. 62.

THIS was a writ of entry, brought to obtain possession of certain lands, mortgaged by the tenant to *Royal Makepeace* and *Robert Vose*, in joint tenancy *at common law*, since the statute of 1785, c. 62, (by the fourth section of which it is enacted, that all gifts, &c., of any lands, &c., made to two or more persons, shall be taken to be estates in common, and not in joint tenancy, unless it shall be therein said that the grantees, &c., shall hold the lands, &c., jointly, or as joint tenants, or in joint tenancy, or to them and the survivors of them, or unless other words be therein used, clearly and manifestly showing it to be the intention of the parties to such gifts, &c., that such lands, &c., should vest, and be held as joint estates, and not as estates in common,) and after *Vose's* death assigned by *Makepeace* to the demandant in fee. The mortgage was made to secure a debt due to *Makepeace* and *Vose* jointly, they being partners in trade.

The tenant pleaded in bar, that the mortgage was usurious, which was traversed, and on the traverse issue was joined, which was tried before *the chief justice*, at the sittings here after the last October term.

The report of *the chief justice* states that the tenant, to maintain the issue on his part, offered to give in evidence *the confession of *Makepeace*, made before the assign- [* 132] ment of the mortgage. This was objected to, and the evidence was rejected by the judge. The tenant offered to swear *Makepeace* as a witness; to which he objected, declaring that it was his interest that the demandant should recover. The tenant did not move to examine *Makepeace* on his oath as to his interest, but the demandant's counsel, to prove *Makepeace's* interest, produced a bond of even date with the assignment, as executed by *Makepeace* to the demandant, in the penal sum of 2180 dollars, on condition that, after the termination of the suit on the mortgage to be commenced by *Appleton*, whether he should recover possession or not, if he should reconvey the mortgage to *Makepeace*, on his paying the demandant 1090 dollars, with interest, then the said bond to be void; which bond was executed as an escrow, to be delivered &c. the demandant on a condition to be performed by him, and not within the control of *Makepeace*. On this evidence the judge ruled

that *Makepeace* might be sworn as a witness, if he consented ; but that he could not be compelled to be a witness against the demandant. The tenant then offered one *Daniel P. Parker* as a witness, who also refused to be sworn, saying that it was his interest that the demandant should recover. The judge then ordered him to be sworn on the *voir dire*, on which oath he answered ; that he and the demandant were joint partners in trade, that the mortgage was assigned to the demandant to secure a debt due from *Makepeace* to the copartnership ; and that if the demandant recovered, he should be equally interested with him in the judgment. On which, at the tenant's motion, one *Daniel Stephens*, jun. was sworn, and testified that said *Parker* had told him that he had no interest in the said mortgage ; and *Parker* again answered, that being particularly acquainted with the tenant, and not wishing him to know that he was interested in the mortgage, he had concealed his interest from the witness *Stephens*. The judge ruled that he could not [* 133] compel *Parker* to testify against the demandant ; but *that he might, if he consented, which he refused to do. A verdict was then found for the demandant, with liberty for the tenant to move for a new trial, upon the judge's report, because proper evidence, as the tenant supposed, was not admitted, and because the conveyance to the demandant was of a moiety only of the demanded premises.

The action stood over to this term, for a decision of the tenant's motion for a new trial ; and now *Dana*, of counsel with him, seemed not to have prepared himself for argument, and submitted the cause with observing, as to the last point only mentioned in the report, that the words of the mortgage deed were clearly within the statute, and must, therefore, be held to convey an estate in common, so that after *Vose's* death, *Makepeace*, the survivor, was seised of a moiety only, and could of consequence assign no more than such moiety to the demandant.

Bigelow, for the demandant, argued that, from the preamble to the provision of the statute, taken in connection with the enacting clause, it was very plain that the legislature did not intend to include a conveyance like the present. The preamble recites that estates in joint tenancy are often created against the intention of the parties ; and in the enacting clause there is an express exception of cases where it shall manifestly appear that the intention was to create a joint tenancy. Now, it is very certain that the parties here intended this mortgage as a collateral security for the debt it was made to secure ; that debt is due to the survivor of the two creditors. It would be a most manifest absurdity that the heirs of *Vose*, the deceased mortgagee, should take a moiety of the land, without

any interest in the debt it was pledged to secure, and that *Makepeace* should be entitled to the whole debt, and still have an interest in but a moiety of the land pledged for its security.

The action being continued *nisi*, the opinion of the Court was delivered at the following November term in *Suffolk*, by

PARSONS, C. J. Since the argument, we have looked into the case, and are of opinion that judgment be rendered * for the demandant on the verdict. Three objections [* 134] were made to the judge's directions.

1. That he did not compel *Makepeace*, the assignor of the mortgage, to be a witness for the mortgagor. But *Makepeace* very clearly had an interest in supporting the mortgage; for if the demandant should fail in recovering, yet by reconveying the mortgaged estate of *Makepeace*, the latter would forfeit his bond, unless he paid the demandant a sum of money. It was, therefore, *Makepeace's* interest that the mortgage should not be declared void, as usurious.

2. Another objection was, that the judge would not compel *Daniel P. Parker* to be sworn as a witness against the demandant; after *Parker* had sworn that, as a partner in trade with *Appleton*, he was jointly and equally interested with him in the event of the suit. There seems to be no foundation for this objection. If *Parker* swore falsely, he ought to be convicted of perjury. (a)

3. The objection to the demandant's title is founded on the statute of 1785, c. 62, § 4, which provides that all conveyances to two or more grantees shall be adjudged to convey estates in common, unless it appear from the conveyances that the intent of the parties was, that joint estates should pass.

The conveyance before us is a mortgage to two persons in fee, to secure the payment of a debt jointly due to the mortgagees. As, upon the death of either mortgagee, the remedy to recover the debt would survive, we are of opinion that it was the intent of the parties, that the mortgage, or collateral security, should comport with that remedy; and, for this purpose, that the mortgaged estate should survive. Upon any other construction, but one moiety of the mortgaged tenements would remain a collateral security for the joint debt; which would be clearly repugnant to the intention of the parties to the mortgage. The objection to the demandant's title to the whole cannot prevail; and judgment must be rendered on the verdict for the demandant, as on a mortgage.

(a) [Both *Makepeace* and *Parker*, notwithstanding their interest, might have been compelled to testify against it. — *Bull vs. Loveland*, 10 Pick. 9. — *Taney vs. Kemp* 4 Harr. & Johns. 348. — *Stoddart vs. Manning*, 2 Harr. & Gill. 147. — *Baird vs. Cuchran*, 4 Serg. & Rawl. 3:7. — *Drvoll vs. Brownell*, 5 Pick. 448. — Ed.]

DANIELS & AL. vs. DANIELS & AL.

* JAPHET DANIELS, NATHAN HAYWARD, AND CYNTHIA, his Wife, AND JONATHAN WHITE, AND MELATIAH, his Wife, *versus* OSIMUS DANIELS, AMARIAH DANIELS, AND ELIJAH DIX.

Tenants in common, and heirs, by our statute of distributions, must join in an action for the destruction of their charters or title deeds

THIS was an action of the case. The declaration contained several counts. That on which the verdict was found states, that *Japhet Daniels*, deceased, was seised in fee simple of sixty acres of land in *Holliston*, having purchased the same of the defendant *Dix*, by his deed duly executed, but not recorded; that the said grantee died so seised and intestate, and thereupon the tenements descended to the plaintiffs *Japhet*, *Cynthia*, and *Melatihah*; and to the defendants *Osimus* and *Amariah*, his children and heirs; that the defendants, with intent to defraud the plaintiffs of their shares and interest in the said tenements, destroyed the title deed from *Dix* to the ancestor; and that *Dix* executed another conveyance of the tenements to the other two defendants.

The defendant *Dix* having died before the trial, his death was suggested upon the record, and the plaintiffs had leave to prosecute against the other two defendants, who pleaded not guilty; upon which a trial was had, and a verdict found for the plaintiffs. Whereupon the defendants, by their counsel, moved in arrest of judgment, upon the ground that the complaints of the plaintiffs, if they exist at all, are several complaints; and ought to be prosecuted by them severally, and not jointly.

Ward, in support of the motion, contended that the plaintiffs could not join in the action, their interest being several, and not joint; there is no survivorship between them; the injury to one is no injury to another; neither could one of the plaintiffs have released the right of action for the whole. The law, as to the point under consideration, must be the same that it was before the statute of 1789, c. 2, abolished the right of primogeni
[* 136] ture. But it will not be said that, if * the plaintiffs were entitled to damages in unequal shares, they could join in the action. (1)

Bigelow, for the plaintiffs, insisted that the injury was joint, as in the case of slandering a title. As to the several parts, or shares,

(1) *Bro. Abr. Tit. Joinder in action.* — 1 *Chitty on Pleading*, 8. — 1 *East's Rep* 226 *Birkley & Al vs Presgrave*.

into which the plaintiffs are to divide the damages among themselves when recovered, this is no affair of the defendants. It is enough for them, that they cannot be held to pay more damages than they are proved to have done injury; and it is beneficial to them to be sued in one action rather than several. It is clear that none have been injured by this misconduct of the defendants but the plaintiffs. (2)

The action was continued *nisi* after the argument, and the opinion of the Court was delivered at the succeeding November term in *Suffolk*, by

PARSONS, C. J. The counsel for the defendants have argued that, the interests of the plaintiffs in the land being several, and not joint, each of the plaintiffs should have prosecuted severally; and that because they have sued jointly, the judgment ought to be arrested.

Upon the death of the ancestor, the estate descended to all his children; they making in legal contemplation but one heir; and being considered as *quá* parceners, they must all have joined in a real action to recover the land, if their ancestor had died disseised; in which action summons and severance lay. Thus the law stood until the statute of 1783, c. 52. By the third section of this statute it is enacted, that in actions of waste, ejectment, or other real actions, where the possession of the inheritance, alleged to have descended, is the object of the suit, the heirs may all, or any two or more may join, or each one may prosecute for his particular share. Although this statute was repealed by the statute of 1785, c. 62, yet this provision is re-enacted in the repealing statute; and a similar provision is made for joint tenants when disseised. These provisions are confined to actions real or mixed, and do not extend to personal actions to recover damages only, which remain subject to the rules of the common law.

* Now, in personal actions tenants in common must [* 137] join, and also parceners, when damages are to be recovered for a tort done to their lands, although the estate in the lands be several. *Co. Lit.* 198. The rule by which joinders in actions are governed, is stated in the case of *Weller & Al. vs. Baker*, which was cited at the bar, as extending to all cases where the damages to be recovered are joint. The same rule is also laid down in the case of *Coryton vs. Lithebye*, which was also cited in the argument. Thus tenants in common must join in trespass, and

(2) 2 Saund. 115, *Coryton vs. Lithebye*. — 2 Wils. 423, *Weller, &c., vs. Baker*.
3 Lev. 362. *Ward vs. Brampton*.

also in nuisance. *Cro. Jac.* 231. (a) But they cannot join in an action for forging false deeds, for that concerns the inheritance, which is several. But they must join in detinue of charters, which also concerns the inheritance. *Co. Lit.* 197, b. The reason of the distinction is, that in the forged deeds the tenants in common have no interest, and can receive no prejudice from them, but as they may affect their several titles to the lands; but in the lawful title deeds each tenant in common has a property, and this property, from its nature, must be joint.

As it is well settled that tenants in common must join in detinue of charters, from a necessary analogy, founded on the same reason, they must join in an action for the destruction of their charters; for, in this case, not only their interest but the damages are joint. And if tenants in common must join, so must the heirs, by our statute of distributions; whether they be considered as tenants in common, or as resembling parceners.

But the action before us is for destroying the charter, which is the evidence of the plaintiffs' title; and, in our opinion, they have very properly joined in demanding damages for this injury. And although trover will not lie by one or more of the heirs against the other heirs for the conversion of the charters, because each heir has an equal right to the possession of the title deeds, yet when those deeds are absolutely destroyed by some of the heirs, trespass will lie against them by the other heirs, because by their destruction [* 138] the tenancy in common in them cannot be set up in defence. *Co. Lit.* 200, b. And if trespass will lie, no reason has been assigned why case for the tort cannot as well be maintained.

The taking of a new deed from *Dix* appears to come within the principle of forging deeds, both cases tending to furnish evidence of a title not existing; and in this new deed the plaintiffs have no interest or property; and there seems to be no legal principle authorizing them to join in the action. But we do not consider this last fact as any part of the *gravamen*, but as alleged only in aggravation of damages.

Upon the whole, it is our opinion that judgment be not stayed, but that it be entered for the plaintiffs on the verdict.

(a) [This is not universally true. In trespass, for mesne profits, they may severally sue; and, in general, tenants in common, in personal actions for torts or injury to real estate, may sue separately. — 1 *Chitty*, 6th London edition, 65, 66. — Ed.]

JEDUTHUN WILLINGTON *versus* ALPHEUS GALE.

The purchaser of an equity of redemption, sold by the sheriff on execution, pursuant to the statute of 1798, c. 76, obtains by such sale a legal seisin of the land, and may maintain a real action against any stranger, unless such stranger had, in fact, disseised the mortgagor before the sale of the equity.

THIS was an action of *entry sur disseisin*, in which the demandant counted upon his own seisin, and on a disseisin by the tenant. Trial was had upon the general issue, and a verdict being found for the tenant, the demandant moved for a new trial for the misdirection of the judge.

From the judge's report it appears, that the tenements demanded were under mortgage; but neither the mortgagee, nor any under him, had entered for condition broken. The equity of redemption was regularly seized upon execution against the mortgagor, and legally sold by the sheriff to the demandant in fee, who received a regular deed of conveyance from the sheriff, duly executed, acknowledged, and recorded. This was the evidence of the demandant's title.

The tenant entered, not claiming under the mortgagee, nor as a disseisor of the mortgagor; and the judge's opinion at the trial was, that the demandant must prove an actual entry after his conveyance, in order to maintain his *action. [* 139] Such evidence not being produced, the jury returned a verdict for the tenant. And this opinion of the judge was the ground of the motion for a new trial, which was briefly argued at the last October term in this county, by *Ward* and *Fay* in support of the motion, and *Bigelow* in favor of the verdict, and the action being continued *nisi* from the present term, the opinion of the Court was delivered at the following November term in *Suffolk*, by

PARSONS, C. J. The mortgagor, after his mortgage, still continues the owner of the land, and seised of it against all persons but the mortgagee, or those who claim under him; and he has therefore a right to convey the estate mortgaged, defeasible only by the mortgagee, or some person having his right; and if he conveys, thus having a right to convey, by deed executed, acknowledged, and registered, the purchaser shall be deemed actually seised, without entry or livery of seisin.

The statute of 1798, c. 77, which makes rights in equity, of redeeming real estate mortgaged, liable to be seized and sold on execution, provides that the sheriff's deed shall convey the debtor's right in equity to the purchaser, his heirs and assigns, in the same manner as if the debtor had executed the deed.

The purchaser thus having a legal right to the equity of redemption, has also a legal seisin of the land, when neither the mortgagee nor his assigns have entered, subject, however, to their claim; and may maintain a real action against any stranger, unless such stranger had, in fact, disseised the mortgagor before the sale of the equity. But the tenant in this case does not claim as a disseisor of the mortgagor; against him, therefore, an actual entry, in our opinion, was not necessary; and in this opinion the judge, who tried the cause, upon further consideration concurs. The verdict must be set aside, and a new trial granted. (a)

(a) [*Tuttle vs. Brown*, 14 *Pick.* 514. — Ed.]

[* 140]

* *JESSE GOODENOW versus JONAS BUTTRICK.*

The provincial act of 6 *G. 2, c. 2*, respecting an officer's setting off cross executions against each other, is not repealed by the revised statute of 1783, *c. 57*, concerning the issuing and serving of executions.

An officer, having an execution in favor of *A* against *B* and *C*, and another in favor of *B* against *A*, ought, if *B* consent, to set off one execution against the other.

Rut where a coroner had an execution in favor of *A B*, against a deputy sheriff and another, and that other had an execution against *A B*, directed to the sheriff or his deputy, which he offered to the coroner, and requested him to set off one against the other; it was held that this was not a case within the act of 6 *G. 2, c. 2*, and that the coroner, being a stranger to the last precept, was not obliged to receive it, nor to return it in any part satisfied.

Where *A* obtains a judgment against *B* and *C*, and, at the same term, *B* recovers a judgment for a larger sum against *A*; if *B* will acknowledge satisfaction of the amount of *A's* judgment against *C* and himself, in part of his judgment against *A*, the Court will stay *A's* execution, and give *B* and *C* their execution for the balance.

TRESPASS for taking and carrying away the plaintiff's horse and chaise. The parties submitted the action to the opinion of the Court upon the following case:—

“The said *Buttrick*, on the 10th of July, 1809, was one of the coroners for the county of *Middlesex*, duly qualified to serve writs and executions; and had committed to him, to levy and serve, a writ of execution in favor of one *William Jewell*, against the plaintiff, who was a deputy sheriff, and one *Ezekiel Gates*, which issued on a judgment rendered in this Court April term, 1809, for the sum of 105 dollars; by virtue of which execution the said *Buttrick* took the said horse and chaise, kept, advertised, and sold the same,

 GOODENOW vs. BUTTRICK.

as the law requires; which is the same taking of which the plaintiff complains. On the same day of the taking the horse and chaise, the said *Gates*, having recovered judgment at the same term against the said *Jewell*, for the sum of 118 dollars, presented to the said *Buttrick*, for service, a writ of execution, issued on the same judgment, directed to the sheriff of the said county of *Middlesex*; and the plaintiff and the said *Gates* requested the said *Buttrick* to set off the execution first mentioned against the execution last mentioned, and offered him his fee for so doing; but the said *Buttrick* refused so to do, and afterwards advertised and sold said horse and chaise as aforesaid."

Ward, for the plaintiff, cited the provincial act of 6 *Geo. 2, c. 2*, by the second section of which it is enacted, that "when it shall happen that the sheriff, his deputy, or any coroner or constable, shall, at the same time, have several executions, wherein the creditor, in one execution, is debtor in the other, in such case such officer or officers are directed *to cause one execution [* 141] to satisfy the other, as far as the same will extend."

And he contended that the provision did not require that the two executions should be directed to the same officer. *Gates* ought not to be exposed to hardships and inconvenience, because a co-debtor with him happened to be a deputy sheriff. The provision of the statute is remedial, and ought to have a liberal construction. The same mischief, which it was intended to remedy, existed in the present case.

Bigelow, for the defendant, insisted that the execution never was delivered to the defendant, and if it had been he could not have served it, as it was not directed to him. He would have been a trespasser if he had attempted to make service of it.

The statute plainly includes the case only of two executions in the hands of the same officer, and which such officer shall be legally qualified to serve. This was not the present case. It is also very clear that the executions must be between the same parties. But here *Gates* alone was the creditor in one execution, and *Gates* and *Goodenow* the debtors in the other. And though this last point may have no great weight upon an equitable consideration, yet no construction ought to extend a statute beyond its plain language, and the end which the legislature had in contemplation at the passing of it.

But whatever may be the legal or equitable construction of the act in question, it is repealed by the revised statute of 1783, *c. 57*, directing the issuing, extending, and serving, of executions. This statute provides for every case within the scope of its title; but the provision cited from the provincial act is not contained in it. In-

deed, the second section gives to every judgment creditor a right to extend his execution upon his debtor's land, and makes no provision for setting off cross executions against each other. It has been always considered that the revised statutes virtually repealed the old laws *in pari materie*, without any express clause of repeal.

[* 142] * *Ward*, in reply. The execution was offered to the defendant, and his refusing to take it forms for him no excuse, if he was legally bound to receive it.

As to the objection, that here were not the same parties, *Gates's* consent to set off his execution against *Jewell's*, is a sufficient answer to it. Besides, the proviso, that the act shall not be construed to extend to any case wherein the creditor in one execution is not, *in the same capacity and trust*, debtor in the other, shows how far exceptions were contemplated, *viz.* where the party claimed in a different right; and there is no equitable nor legal reason why the remedy should not be coextensive with the mischief.

A statute can never be said to be repealed, because the legislature in an after act has not seen fit to re-enact it.

The action was continued *nisi* for advisement, and at the November term following, in *Suffolk*, the opinion of the Court was delivered by

PARSONS, C. J. The plaintiff, to maintain his action, relies on the second section of the provincial statute of 6 G. 2, c. 2. Upon this section two points have been made by the defendant; one is, that the section is not now in force; the other is, that, if it is in force, the true construction of it will not aid the plaintiff in supporting his action.

This provincial statute was unquestionably in force, until the ratification of the present constitution, which provides, in chapter 6, art. 6, for the further continuance of all laws then existing, until they should be altered or repealed. It is not supposed that this provincial statute has been since expressly repealed; but a revision, by the legislature, of the subject matter of it, has, it is said, virtually repealed it.

The provincial statute of 12 G. c. 4, expressly empowered coroners to appoint deputies; but in the statute of 1783, c. 43, revising the several laws relating to the power and duty of coroners, and entitled "An act describing the duty and powers of coroners," the authority to appoint deputies is omitted; and in a case of *Ingalls vs. Story*, in the county of *Essex*, which was mentioned

[* 143] in the argument, the writ * was served by a deputy of the coroner; and exception being taken in abatement, it was holden that, after the passing of the last-mentioned statute

the coroner could no longer appoint deputies, although there is no express repeal of any former acts, and the exception was allowed.

If the object of the revising statute of 1783, c. 57, entitled "An act directing the issuing, extending, and serving, of executions," was to embrace all the antecedent laws, and to reduce them to one system, the case of *Ingalls vs. Story* will be in point. The *first* section of this last statute relates to the suing of executions, and the ascertaining of the times when they shall be returnable. The *second* section provides the manner of levying executions on lands at the creditor's election; and the *fifth* section directs in what manner the officer shall proceed in the sale of goods and chattels seized on execution.

Upon this view of the statute, the object of it does not appear to comprise several provisions of the former laws, undoubtedly intended to be preserved. For no provision is here made for the levying of executions on the lands of deceased persons, for the payment of their debts; and for this purpose we must have recourse to the statute of 1783, c. 32, § 7. And as there is no provision for settling cross executions, we may reasonably presume that the provincial statute of 6 G. 2, c. 2, was not included in the revision.

If it be supposed that this statute was before the legislature when revising the laws, because the first section, relating to mutual book accounts, appears to have been revised in the twelfth section of the statute of 1784, c. 28, it may well be denied that this first section was the object of revision. For the same provision was reenacted in the temporary provincial statute of 16 G. 2, c. 5, with additional provisions, all of which are the subject of the twelfth section of the statute of 1784, c. 28. We are, therefore, of opinion that the second section of the provincial statute of 6 G. 2, c. 2, is in force, and not included among the provisions of the revised statute.

*The next point is the operation of this law upon the [* 144] case at bar. The plaintiff would consider this provision so as to authorize sheriffs and coroners, in cases like the present, to serve either wholly or partially, and to return executions not directed to them, and which, by the existing laws, could not lawfully be directed to them; while the defendant's construction will only introduce a new mode of satisfying cross executions, by officers already authorized to serve and return them. And we are of opinion that the last construction is the true one.

The act applies to cases, when it shall happen that the sheriff shall have cross executions, or when a coroner, or a constable, shall

have cross executions; but neither the sheriff, coroner nor constable can be considered as having any executions, but such as are directed to them, and which they are obliged to obey; or, in other words, these officers must have these writs in their possession, as officers authorized and obliged to obey them.

The present case very rarely happens, and is not within this act, which, like other statutes, must be considered as adapted to the cases that more frequently occur. The defendant, a coroner, to whom the execution of *Gates* was not and could not regularly be directed, was not obliged to receive the same, nor to return it in any part satisfied, he being a stranger to the precept. The defendant must, therefore, have judgment and his costs.

As these cross judgments were recovered in the same court, at the same term, and were final between the parties, the regular mode, in which *Gates* might have been relieved, would have been an application to the court to stay execution in *Jewell's* suit against him, upon his acknowledging satisfaction of the amount of *Jewell's* judgment against him and *Goodenow*, in part of his judgment against *Jewell*, and praying execution for the balance.

We do not consider the objection of any weight, that *Goodenow* and *Gates* are debtors on one execution, and *Gates* alone [* 145] the creditor on the other; for *Gates* might satisfy * the execution against *Goodenow* and himself, and if he thought proper to apply his execution against *Jewell* to that purpose, he might; and on *Jewell's* execution being satisfied by *Gates*, the officer ought immediately to have redelivered to *Goodenow* his chattels, on being reimbursed his expenses.

Costs for the defendant.

LEVI DAY versus AARON EVERETT.

At common law, a father may assign the services of his minor son to another for a consideration to enure wholly to the father; and this for a longer or shorter term, limited, however, by the son's minority and the life of the father.

And the statute of 1794, c. 64, does not take this power from the father; all contracts of service, legal at the common law, remaining legal since the statute; but the only remedy, which either party can have, is upon the contract, and not under the statute, unless the binding pursue the statute.

When minors are bound as apprentices, pursuant to the statute, all considerations must be secured to the apprentice; whether such binding be by parents or guardians, or by the minor with the approbation of the selectmen.

DAY vs. EVERETT.

THIS was an action of *covenant broken*. The declaration contained several counts, all of them upon an indenture made between the parties. The defendant prayed oyer of the indenture, which is dated July 10th, 1799, and by which it appears that the plaintiff, for, and in behalf, and *in request* of his son, *Everett Day*, is one party, and the defendant is the other party; and the indenture witnesseth that the plaintiff doth bind and put his said son to hire, and dwell with the defendant, for the term of six years from the 5th of December, 1799, and covenants with the defendant that he will not remove or displace his said son from the defendant's service during the said term, but that during the term his said son shall faithfully serve the defendant. And the defendant covenants with the plaintiff, among other things, to pay the plaintiff ten dollars on executing the indentures, and the further sum of forty dollars on the 1st of January, 1800; and at the expiration of the term to pay him fifty dollars more, if the son should continue in the defendant's service during the term.

The breach assigned by the plaintiff is the not paying the last sum of fifty dollars, the son having continued in the defendant's service during the term.

The defendant, after the oyer, demurred generally to the declaration, and the plaintiff joined in demurrer.

* *Fay*, in support of the demurrer, relied on a proviso [* 146] contained in the first section of the statute of 1794, c. 64, entitled "An act to secure to masters and mistresses, as well as to apprentices and minor servants, bound by deed, their mutual privileges." The proviso is in the following words:—"Provided, also, that all considerations which shall be allowed by the master or mistress, in any contract of service or apprenticeship, shall be secured to the sole use of the minor thereby engaged." And he urged the expediency and humanity of the provision, as calculated to protect children from the mercenary views of parents, who would sacrifice the present comfort and future prospects of their children to a present gain to themselves.

Ward, for the plaintiff, argued that the proviso cited for the defendant has reference only to the case of minors, having no father, mother, or guardian, within the commonwealth, and who are authorized to bind themselves, with the approbation of the selectmen of the town; but whether this be the true construction or not, the statute may make the contract void, as it respects the minor, and still leave the covenant binding as between the father and the master. As between these last there is nothing in the statute to make the contract void, which is certainly good at common law, notwithstanding all the dangers and mischiefs which have been

stated to arise to minor children from the unfeeling avarice of unnatural parents.

Fay, in reply. Since this statute, there is no other legal mode of binding an apprentice, but such as is conformed to its provisions. If a father assigns the service of his minor son for a time, he may be well entitled to his earnings, for he is still bound to provide for him; but where he places him as an apprentice, he puts the master in his own place, and the latter contracts to educate him, to clothe him, to take care of him in sickness, &c.; so that there is no shadow of reason, why the parent should make a pecuniary benefit to himself out of the contract. In fact, the statute has expressly [* 147] * prohibited it, and to support the present action would be an evasion of one of its most salutary provisions. (1)

The action being continued *nisi*, the opinion of the Court was pronounced at the following November term in *Suffolk*, by

PARSONS, C. J. There is no question but that a father, who is entitled to the services of his minor son, and for whom he is obliged to provide, may, at the common law, assign those services to others, for a consideration to enure to himself. He may contract that his minor son shall labor in the service and employment of others, for a day, a month, or any longer term, so that the time do not exceed the period of the child's emancipation from the father; which may take place, as well on the father's death, as on the son's arriving at the age of twenty-one years. If this common law right is taken away from the father by the statute of 1794, so that no contract by the father, binding his minor son as a servant or apprentice, is legally valid, unless such contract pursue the statute, then the objection made by the defendant to the covenant declared on in this case will deserve some consideration.

The statute, after describing the powers of fathers, mothers, or guardians, and of the minor with the approbation of the selectmen, or the greater part of them, annexes two provisos. One is, that in every case there shall be two deeds of the same form and tenor executed by both parties, one to be kept by each; and when the deeds are made with the approbation of the selectmen, that approbation under their hands is to be endorsed on the deeds. The other proviso is that relied on for the defendant, *viz.* that all considerations allowed by the master shall be secured to the benefit of the minor. Now, in the deed of which oyer is given in this case, there is no such security made for the minor. Therefore the defendant has argued that the indentures are void; and although he has had the benefit of the minor's service, that he is not obliged to pay the stipulated equivalent.

*The plaintiff has insisted that the proviso, respecting the considerations to be secured to the minor, relates only to deeds by which the minor is bound with the approbation of the selectmen, and not to deeds by which a minor is bound by parents or guardians; for they may safely be trusted to do nothing prejudicial to the child or ward, while the selectmen might, through carelessness or negligence, approve of contracts which might be prejudicial to the minor.

But on looking into the statute, we are not satisfied that this distinction exists. The proviso is general, and provides for considerations allowed by the master in any contract of service or apprenticeship, without any exception whatever. And there may be good reason why a minor of fourteen years of age, who is bound by his own consent during his minority, under the authority of this statute, should have the consideration for his services, whether it be the knowledge of a trade, the having of an education, or the receipt of money, for his own benefit when he shall come of age, and be obliged to provide for himself.

For a binding under the statute obliges all parties: it obliges the servant to obedience, subjects him to reasonable personal correction for his faults, and if he abscond, to a compulsory return to his master, or to imprisonment. Or, if the servant be guilty of gross misbehavior, the Common Pleas may discharge the master from the contract. And if the master treat the minor with cruelty, the same court may discharge the minor from the contract.

But the statute does not, like the English statute of 5 *Eliz. c. 4*, § 41, relating to apprentices and servants, make void all contracts by which a minor is bound in service, unless such contracts as are made pursuant to the statute. All contracts of service, legal at the common law, remain legal since the passing of this statute; but the only remedy, either party can have, is on the contract, and not under the statute.

It is therefore our opinion, that the covenants declared on are not within this statute, so that either party or the minor could have relief according to the provisions of the statute:

*but as the covenants are good at common law, and the [* 149] statute has not made them void, it is also our opinion that the covenants are not void, but that no remedy lies for either party on a breach of them, but by action at law. And as well parents and guardians, as masters, ought duly to consider, that if the contract of apprenticeship does not pursue the statute, the apprentice cannot be discharged, if the master break the contract on his part; neither, if the contract be broken on the part of the apprentice, can the master have those remedies, and that relief, provided in the statute

for contracts made pursuant to it; but the remedy for each party is by action, which in many cases may be inadequate.

In the case at bar, as the deed is good at common law, and not made void by the statute, the declaration appears to us to be good; and the plaintiff must have judgment for his damages assessed at fifty dollars, with interest from the day it was payable to this time.

THOMAS LOCKE *versus* JOHN TIPPETS AND HIS TRUSTEES,
WILLIAM WHITEMORE, AMOS WHITEMORE, AND ED-
WARD WALKER.

Where *A* and *B* were summoned as the trustees of *C*, and pending the suit, *C* recovered a judgment against them, which they reviewed, giving bond, &c., and pending the review. *A* and *B* settled the action with *C*, by paying him the amount of the first judgment, with double interest and costs, according to the condition of the review bond they were charged as trustees, notwithstanding such payment.

THIS action was commenced by writ returnable to the Court of Common Pleas holden for this county, on the Monday preceding the third Tuesday of March, 1807; which writ was served on the principal the 26th of the preceding February, on *W. & A. Whittemore* the next day, and on *Walker* on the 2d day of March following. In this action the plaintiff demanded four several sums of money, due by four several promissory notes made by the defendant to the plaintiff. The action was duly entered and prosecuted, and the defendant, *Tippets*, was defaulted; the two *Whittemore* [* 150] *mores* * then appeared and offered to answer, but it was agreed by them and the plaintiff, that the action should be continued against the trustees, until the determination of a suit then pending between *Tippets* as plaintiff and these supposed trustees as defendants. In this last suit judgment was rendered in this court November term, 1808, for *Tippets* against the defendants, who procured a stay of execution by giving bond to review in due form of law. The action was reviewed by writ returnable to the then next April term of this court, at which term it was entered and continued to the succeeding October term, 1809. This action of *Locke* against *Tippets* and his trustees, was continued from term to term in the Common Pleas, to September term, 1809, when *Walker*, one of the trustees, was defaulted, not submitting to an examination;

LOCKE vs. TIPPETS & TRUSTEES.

and the two *Whittemores*, upon their examination under oath, declared that the contract, on which *Tippets* had sued them, was not intended to be their personal contract, but an agreement on behalf of the *Middlesex* turnpike corporation; that a review of said action was still pending; and that they had no other goods, effects, or credits, belonging to *Tippets*, in their hands, when this process was served upon them. Upon this disclosure, by the judgment of the Common Pleas, they were discharged with costs against *Locke*, who had judgment against *Tippets*, and an award of execution against his body, goods, and estate, and against his goods, effects, and credits in the hands of *Walker*. From this judgment *Locke* appealed to this Court; and at last October term of this Court, the two *Whittemores* further disclosed on oath, that they had settled the action of review with *Tippets* by paying him the former judgment, with twelve per cent. interest, and double the costs of the review agreeably to the condition of the review bond.

The question before the Court upon these facts was whether the two *Whittemores* were liable to be holden in this action as the trustees of *Tippets*, the principal defendant. * This [* 151] question was argued at the last March term in *Suffolk*, the action having been continued *nisi* by *Ward* for the plaintiff, and *Bigelow* and *Dana* for the trustees.

For the trustees it was said that they ought not to be charged, because they had never, since the service of the process upon them, had it in their power to retain the effects from *Tippets*, who demanded them by his action prior to the commencement of this suit; and for this they relied on the case of *Howell vs. Freeman & Trustee*. (1) The trustees could not plead this attachment in bar of *Tippets's* action against them, without acknowledging his right of action, and giving up a defence, on which they placed the most confident reliance, until they were undeceived by the decision of this Court.

Ward insisted that the trustees had paid this money through their own folly. They had an opportunity to defend themselves against *Tippets*, and this is an answer to the case of *Howell vs. Freeman*. They might have had an opportunity to discharge themselves by plea to an action of debt, or to a *scire facias*, on the first judgment; or on an action on the review bond. In the original action, they might have pleaded double, and thus have made their defence, and also have brought into Court the amount attached; or, when they finally paid the money on the review bond, they might have deducted the sum due from *Tippets* to *Locke*. But they chose to adjust the business out of Court, with what intention it is needless

(1) 3 *Mass. Rep.* 121.

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to conjecture. But whatever was their intention, or whatever the inconvenience they may have brought upon themselves, the provisions of the statute are not to be thus evaded.

At the following November term in *Suffolk*, the action still being continued *nisi*, the decision of the Court was pronounced by

PARSONS, C. J. On the facts in this case, it is manifest that when the supposed trustees were attached, they had goods, [* 152] effects, and credits of *Tippets* in their hands. * Their counsel have cited the decision of this Court in the case of *Howell vs. Freeman and Frye*, his trustee, as applicable to the circumstances of the case at bar. The principle decided in that case we consider as correct; but the application of it to the case under consideration may well be denied. The embarrassment, of which the trustees here complain, arises wholly from their own error. Had they formed a correct opinion, they would not have disputed *Tippets's* demand against them, further than was necessary to deduct *Locke's* demand against him. At the first term of the Common Pleas, *Tippets* by his default admitted *Locke's* demand, and judgment might then have been entered in this suit; which judgment they might have satisfied, and then discounted it out of *Tippets's* demand against them.

But if this measure was prevented by their too great confidence in their defence, they certainly acted imprudently, when, submitting to *Tippets's* demand, they paid the whole of the review bond, instead of deducting so much of the original debt, as had been attached in their hands on this suit. And if *Tippets* had refused to allow the deduction, and had put the bond in suit, this Court would have allowed it, on the same principle that they would have allowed a partial payment of the judgment to *Tippets* himself. If therefore the trustees, paying the money once to *Tippets*, and again to *Locke*, his attaching creditor, are driven to their remedy against *Tippets*, to recover back the money paid to his use, they must impute the inconvenience to their own mistakes or inattention; for which they are to suffer, and not the plaintiff *Locke*, to whom no laches are chargeable.

Let the plaintiff have judgment against *Tippets*, and let all the trustees stand charged, and execution issue accordingly.

*MEHITABEL HASTINGS *versus* WILLIAM DICKINSON AND
ELIZABETH, HIS WIFE.

A jointure, whether made before or after marriage, was no bar to dower at common law ; and no jointure is now a bar, within the statute of 27 H. 8, c. 10, (which has always been in force here,) unless it be a freehold estate in lands for the life of the wife, to take effect immediately on the husband's death. Therefore, where, by a marriage settlement, the husband covenanted that the wife should have an annuity out of his estate, in consideration whereof, she covenanted not to demand dower in his estate, it was held that she was still entitled to her dower.

THIS was a writ of dower, and was submitted to the opinion of the Court, upon a state of facts agreed and filed.

From the statement it appears, that the demandant was once the wife of *Thomas Hastings*; that during the coverture, her said husband was lawfully seised in fee simple of the land, of which his widow demands her dower; that during the coverture, he mortgaged the lands in fee to *Elizabeth Balch*, then sole, but since married to *William Dickinson*, and with him the tenants in this action; that on the death of the said *Thomas Hastings*, the said mortgage not having been discharged, the tenants entered, in right of the wife, for condition broken.

It further appears from this statement, that previous to the marriage of the demandant with her husband *Hastings*, a marriage settlement was executed by them and one *Jacob Watson* as a trustee. In this settlement, the demandant covenanted with her intended husband, his heirs, executors, and administrators, that, in consideration of the intermarriage, and of the provision made by him by the covenants and agreements therein after mentioned to be done and performed on his part, for her support in case of widowhood, *never to demand, claim or challenge any right of dower for her thirds in the whole of the estate, of which the said Thomas might die seised and possessed.* And the said Thomas, in consideration of the premises, for himself, his heirs, executors, and administrators, covenanted with the demandant, and the said trustee, that if she survived him, she should have full right and power to demand and receive in money of his executors or administrators six per cent. on one fourth part of all the estate, of which he should die seised and possessed, after the payment of all his debts ; or at the rate of one dollar by the week, if the said six per cent. was not an equivalent, [* 154] and this annuity to continue during her life. There were some other stipulations and conditions in the said settlement, which have no bearing upon the present case.

And it was further agreed by the parties, that the said *Thomas Hastings* died testate, having made in his will some provision for the demandant; that she has renounced that provision; and that his estate is insolvent, and insufficient to pay all his debts.

If, upon these facts, the Court should be of opinion that the demandant is entitled to dower in the land described in her writ, the tenants agreed to be defaulted, and that judgment should be rendered that the demandant recover her dower with legal damages and costs; otherwise the demandant agreed to become nonsuit, and that the tenants should have judgment for their costs.

At the last October term, *Hilliard*, of counsel for the tenants, argued that this marriage settlement was a bar to the demandant's action; that it is a perpetual covenant, which the Court, to avoid a circuitry of action, would construe to be a release or estoppel; and that the intermarriage did not discharge the covenant. (1) A reasonable expectation or even a hope of a contingent interest is a foundation for a contract. (2)

At the November term of the present year in *Suffolk*, the action being continued *nisi* from the present term for advisement, the opinion of the Court was delivered by

PARSONS, C. J. If the marriage settlement in this case is a bar to the demandant's action, this effect must be derived from the supposed jointure settled on the intended wife before marriage with her consent, within the provisions of the statute of 27 *Hen. 8, c. 10*, which have always been in force here; or from her covenant never to claim or demand dower operating as a release.

As to the first ground, it is well known that at common law a jointure made to a wife, before or after marriage, was no [* 155] bar to her dower; because the dower, being a * freehold estate, could not be barred by any collateral satisfaction. *Co. Lit. 36 b. — 4 Co. 1.* A jointure therefore, which will be a bar of dower, must be within that statute. But no jointure is by that statute a bar of dower, unless it be a freehold estate in lands, tenements, or hereditaments, for the life of the wife at least, and which shall take effect in possession or profit immediately on the husband's death.

By comparing a jointure of this description with the provision for the demandant in the marriage settlement before us, there seems to be no color for admitting that provision to be a jointure within the statute; as it is a mere personal annuity. The statute also makes provision, when the widow is evicted of her jointure, which has been

(1) 5 *Bac. Abr. Covenant, A. — Ibid. Release, H.* — 1 *Cruise on Real Property. — Jointure, c. 1, p. 201 — 203.*

(2) *Marshall on Insurance, 89, 92, 219. — 4 Brown's Chanc. Rep. 506, in notis.*

regularly settled upon her, that she may be let in to claim her dower in other lands of her husband's; as the consideration, on which she was barred, has totally failed. As in this case the insolvency of the husband has deprived the widow of the contemplated annuity; if it were possible to consider this annuity as a freehold estate, yet within the equity of this statute, she ought to be admitted to her claim of dower, the consideration of her covenant having wholly failed.

This leads us to the second ground, viz. that the demandant's covenant ought to have the effect of a release of dower. But this effect cannot be admitted on any correct legal principle. It is true that a covenant never to prosecute an existing demand shall operate as a release, to avoid circuity of action. But a release of a future demand, not then in existence, is void. Now, in this case, the settlement being executed before the marriage, the demand of dower had no existence, the same not being inchoate. On this principle, if there be any relief against the widow on her covenant, it must be by action.

But when we examine the settlement, it is manifest that she covenanted on the consideration that the provision made for her is performed. But this consideration has failed through the insolvency of the husband: there is, therefore, no legal or equitable remedy against her or her covenants.

* On this view of the subject, the tenants must be called, [* 156] and the demandant must have judgment to recover her dower, and her damages to be assessed, with her legal costs.

Fay for the demandant.

Tenants defaulted.

THE INHABITANTS OF GROTON *versus* THE INHABITANTS OF SHIRLEY.

When part of an existing town is detached, and annexed to another existing town, the inhabitants of such part, having a settlement in the town from which they are detached, acquire by such annexation a settlement in the town to which they are annexed.

THIS action was case against the defendants to recover the expenses of maintaining *James Bartlett*, a pauper, alleged to have his settlement in *Shirley*.

The cause was tried on the general issue, before *the chief justice*, at the sittings here after the last October term

On the trial, it was admitted that the pauper's settlement was derived from his father, *Samuel Bartlet*; and that if the father's settlement was in *Shirley*, the plaintiff must recover. On this point it was proved that *Samuel*, the father, before and on the 25th of January, 1765, lived in *Stow*, in that part of it then called *Stow-leg*, having his legal settlement there; that on the same 25th of January, by an act of the provincial legislature, the said *Stow-leg* and all the inhabitants living on it were annexed to and made a part of the town of *Shirley*; that the said *Samuel* continued to dwell in that part of *Shirley* formerly *Stow-leg* from that time to the 18th of April, 1767, without having been warned out; and on this last day he removed to *Groton*.

On these facts the *chief justice* directed the jury, that in law the said *Samuel* had acquired a settlement in *Shirley*; and a verdict was found for the plaintiffs. The defendants moved for a new trial, on the ground of a misdirection by the judge.

The action stood over to this term upon the said motion; and now *Dana*, in support of the motion, contended, 1. That it was unnecessary for *Shirley* to warn *Samuel Bartlet* upon [* 157] * the annexation of his place of dwelling to that town: he did not *go there* to sojourn; and if he had been warned he could not have been removed from his freehold. 2. Notwithstanding this annexation to *Shirley*, he retained his former settlement in *Stow*. (1)

Lawrence for the plaintiffs.

The action being continued *nisi*, the opinion of the Court was delivered at the following November term in *Suffolk*, by

PARSONS, C. J. It is settled, that when a new town is made out of parcels of two or more towns, including the inhabitants living on the parcels, all the inhabitants, having settlements in the towns in which they dwelt, acquire a settlement in the new town by the act of incorporation. But the defendants' counsel have endeavored to distinguish from this case the case where a part of an existing town is detached, and annexed to another existing town.

We are not satisfied that there is any ground for the distinction which is attempted. Upon the annexation of *Stow-leg* to *Shirley*, the inhabitants of *Shirley* were entitled, not only to the benefit of all the lands in the *leg*, but also to all the wealth, property, and personal services of the inhabitants, towards the discharge of the municipal duties of the town of *Shirley*; of all which *Stow* by the annexation has been deprived. It would then be unreasonable to leave to *Stow* the burden of maintaining these inhabitants, when they should

(1), 4 *Mass Rep.* 452, *Bath vs. Bowdoin*. — *Ibid.* 384, *Windham vs. Portland*
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become poor, and unable by their personal labor to maintain themselves. The annexation of *Stow-leg* to *Shirley* must for this purpose, therefore, be considered as having the same effect, as the making of a new town out of *Shirley* and *Stow*.

Let judgment be entered on the verdict.

[* 158]

* COMMONWEALTH versus THE INHABITANTS OF CAMBRIDGE.

It is discretionary with the Sessions to appoint a viewing committee, on an application for a highway, or not; and such committee may be appointed before notice to the town, &c. They need not be sworn; and they may view at the expense of the applicants for the way.

When certain persons had been admitted to oppose the location of a way, and after a continuance, the petitioners moving for further proceedings, prior to which the Court had ordered all the respondents should be notified, and further proceedings were had, without notice to those who had been so admitted, the proceedings were held to be irregular.

The phrase "*from place to place*," in the statute of 1786, c. 67, § 4, means from one place in a town to another place in the same town.

Upon an application for the alteration of an existing way, the Court cannot lay out a new one.

UPON the application of the inhabitants of *Cambridge*, made at the last May term in *York*, for a writ of *certiorari* to the Court of Common Pleas for this county, to remove the record of their proceedings, respecting the laying out a new county road in said town upon the petition of *Andrew Craigie* and *Loammi Baldwin*, esquires, an order was made upon the petitioners to show cause at an adjournment of the last March term in the county of *Norfolk*, to be holden in July, why the writ should not issue; and after a hearing of the parties the writ was then and there ordered, returnable at this term. The writ being returned, the cause was continued *nisi* for argument; and was argued at the November term in *Suffolk*, by *J. T. Austin* for the writ, and by *Dexter* and *Bigelow* in support of the record. And afterwards in the last-mentioned term the opinion of the Court was delivered by

PARSONS, C. J. The proceedings in this case having been certified to us, and having heard, as well the inhabitants of *Cambridge*, as the applicants for the new road, we are now to decide, whether those proceedings are to be quashed or affirmed.

The counsel for the respondents have taken several exceptions to the legality of the proceedings.

It is objected that the Court proceeded to appoint a viewing com-

mittee before notice to the inhabitants. A viewing committee is not directed by law ; and it is entirely discretionary with the Court, whether to appoint one or not ; and when appointed, they are merely to view the ground, and report their opinion ; which report, if objected to, is no evidence in the cause. The can
 [* 159] mittee must be examined * on oath as witnesses, if either party request it. This objection, we therefore think, ought not to prevail ; although it was further objected that they were not sworn before they viewed ; for the view was to enable them to testify before the Court, as intelligent witnesses, on the motion of either party.

But it was further objected, that this committee was expressly appointed to view at the expense of the applicants.

As this expense was to be defrayed by the applicants, whether the report of the committee or their testimony in Court was for or against the petition, this objection does not appear sufficient to quash the proceedings. In the argument it has been supposed that the applicants might make a more liberal allowance to the committee, if the report was in their favor, than if it was against them ; and that the committee, from this consideration, might be under some influence in making their view and report. This we cannot presume, but if the presumption were possible, it might be prudent for the Court expressly to direct, that the expenses of the committee should be allowed and paid by the county ; and to take a stipulation or some security from the petitioners, to reimburse the county this expense.

Another objection is, that the Court of Common Pleas ordered all proceedings to stay until further notice, and that in fact they afterwards proceeded without such further notice.

In looking into the record certified to us, it appears that at December term, 1809, among other respondents, who were admitted to oppose the application, were the proprietors of *West Boston* bridge, and *William Gray*, who were heard by their counsel against the application ; and that at that term the Court ordered that the report of the reviewing committee be continued for advisement, and that the petitioners give due notice to the respondents, who have appeared, when and where they shall move for further proceedings.

[* 160] And it further appears from the same record, * that at the next term the petitioners moved for further proceedings, and the Court thereupon ordered the former respondents, and some others, to be notified to show cause. The proprietors of *West Boston* bridge, and the said *William Gray*, were not included in this order, and did not again appear to respond to the petitioners, nor were they parties on the record to any of the further proceedings. This objection is therefore supported by the record.

Against the validity of the objection, the petitioners say, that as the persons thus omitted to be notified do not appear from the petition to be parties in interest, notice to them was unnecessary ; and although they were admitted by the Court to appear against the petition at the December term, yet they were not afterwards notified, because the Court discovered that in fact they had no interest in the question.

Had the Court assigned this reason on the record, we must have considered it as true, and a sufficient cause for no further notice. But this reason is not assigned on the record, and we cannot travel out of it for facts, either to affirm or quash the proceedings. It appears that they claimed to be parties in interest, that they once appeared as such, that their appearance was allowed, and that while they were in Court an order passed, that no further proceedings should be had, unless they were again notified. We must therefore presume *primâ facie* from the record, that they were parties in interest.

But it is urged that, their interest not appearing from the petition, they were not entitled to notice.

As in petitions for county roads it frequently happens, that the owner or occupants of the lands may be unknown to the petitioners, and as the *termini* of the way prayed for are expressed generally, without an intention on the part of the petitioners to describe particularly the course of the way, or the land over which it may eventually be located ; the Court have decided that, previously to the adjudication, that the way prayed for is of common necessity or convenience, it is not necessary to the legality of the adjudication, * that all persons, who may eventually be [* 161] interested in the location, should be notified ; as previously to the location they will be notified, and may be heard as to the course of the way, as to their damages, if it pass over any of their land, and also against the proceedings of the locating committee. If this were not law, it would be impracticable in many parts of the country to lay out a public highway in due and legal form.

But when a petition shall describe the parties in interest, over whose land the way must pass, if the prayer of the petition obtain, it has not been decided that such persons are not to be notified, before an adjudication that the public shall have an easement in their lands without their consent. Common justice requires that they have an opportunity to be heard, before any definitive order pass affecting their rights.

When the owners or occupiers of the land, who are necessarily parties in interest, are not mentioned in the petition, through the ignorance or negligence of the petitioners, no order of notice to

them can regularly issue ; but if they, in fact, having notice, come into Court, and show their claim of interest against the prayer of the petition, the Court will inquire into their claim, and if it appear to be well founded, will admit them to show cause against the petition ; when they shall be deemed parties in all the subsequent proceedings.

That this was the case of the proprietors of *West Boston* bridge and of *William Gray*, we must presume from the record ; because they were once heard as parties, and notice was directed to be given them before any further proceedings were to be had ; and no reason is assigned on the record, to control this presumption. And because there were further material proceedings had on the petition, in the adjudication that the way prayed for was of common convenience and necessity, without notice to those proprietors, and to the said *Gray*, those proceedings were, for this cause, in our opinion, irregular.

[* 162] * Another objection to the proceedings is the want of jurisdiction in the Court of Common Pleas. The road prayed for will lie wholly in the town of *Cambridge* : this, it is said, is a town way, and cannot be established but by the town, except on application to the Court, if the town shall refuse to establish it. The statute of 1786, c. 67, § 4, authorizes the Court to lay out public highways or county roads from town to town, or from place to place ; and the objection is, that the expression "from place to place" must mean from plantation to plantation, or from a place to a place not within a town or district.

This statute is a revision of former statutes on this subject ; and particularly of the provincial statute of 30 *Geo. 2*, c. 3, § 1, where the authority to lay out county roads is expressed in the same language. But it is very clear that neither statute contemplated the establishment of a county road, unless in some town or towns ; because the road when established is to be made and repaired, and the damages sustained by individuals are to be paid by the inhabitants of the town in which the road is located. And the Court was not authorized to establish roads in plantations, until the passing of the subsequent statute of 1796, c. 57. The phrase "from place to place," after the phrase "from town to town," must therefore obviously include an authority to establish a county road from place to place within a town. And this construction of the statute is reasonable ; for a new county road may be required in some part of a town, where the inhabitants of the town may have no occasion for a town way. (1) This objection is therefore, in our opinion, without any good foundation.

The last objection made to the proceedings is, that the petitioners prayed for an alteration of an existing county road, and the Court have adjudged a new county road to be of common convenience and necessity.

In looking into the record, we find that the petition states, that the existing road may with greater convenience be turned or altered in two places, in the direction there described; * and then the prayer is *that the alteration may be made* [* 163] and established in that direction. The adjudication is, that it is of common convenience and necessity to have one of the alterations made, but that the existing road should not be discontinued.

The jurisdiction given to the Court is to lay out new county roads, or to turn or alter old roads, on application made to the Court. This application is usually by petition; but in whatever form it be made, it must be entered on record, with the names of the applicants; and is the foundation of the future proceedings of the court. (3 Mass. Rep. 229, *Commonwealth vs. Peters.*) And before the Court can proceed to judge upon the application, the town or towns must have reasonable notice to show cause against the petition, if they have cause to show upon the hearing. The issue is the truth or falsehood of the allegations in the petition; and the town can have no motive to appoint agents for any purpose foreign to this issue. If the adjudication be of matters collateral to this issue, and on allegations not made in the petition, the application to the Court is no foundation for this adjudication, neither have the parties had notice, nor have they been heard, as far as the record is our guide, on the matters adjudged.

Thus, if a petition was filed, praying that a county road might be established over *white acre*, and on this petition notice was given to the town in which *white acre* lay, it could not be supposed that the Court could regularly adjudge that a county road over *black acre* in the same town was of common convenience or necessity.

The present petition is for an alteration of an existing highway, and to show cause against this petition the town of *Cambridge* was notified. It has been decided that an alteration in the course of an existing road is in law a discontinuance of so much of the existing road, as the course of it was altered. (3 Mass. Rep. 406, *Commonwealth vs. Inhabitants of Westborough.*) It also appears from the record, that the adjudication was, that it was of common convenience * and necessity, that one of the alterations [* 164] prayed for be made; but that such part of the old road, as lies between the two points, where the alteration begins and ends, *should not be discontinued*. Hence it is manifest, that what the Court denominate an alteration is in law a new county road

And if it be legal for the Court, upon a petition for an alteration, and upon notice to show cause against an alteration, to establish a new county road in the place where the road was prayed to be altered, and to leave remaining the whole of the existing road, then this objection must fail.

The counsel for the record have argued, that this petition is for turning or altering an old road, and that an old road may be *turned*, without implying a discontinuance of any part of the existing road.

It is true that in the recital of the petition it is mentioned, that the old road may be turned or altered, with greater convenience; but the petitioners considered the words as synonymous, for they pray expressly for an alteration, omitting the word *turning*. And we are satisfied that the petitioners were correct in not making any such distinction, and that the turning of part of the course of an old road to another direction is in law a discontinuance of that part of the old road, the course of which was turned. As to the reasoning from the widening of an existing road, it does not appear to have any weight; for the widening of a road is not turning or altering any part of it, but extending the public easement to other lands adjoining, by which they also become a part of the highway.

We now recur to the principal question. It seems a well-established rule in all legal proceedings, that the adjudication should be of the matter in dispute. This rule is so reasonable, that it ought to be adhered to; because it cannot be supposed that any matters are litigated, but those which appear upon the record to be in dispute, nor that the parties are heard upon any matters not regularly in litigation. When therefore the adjudication is not of [* 165] the matters *in dispute, the record does not furnish any evidence that the parties were heard.

To apply this principle to the case before us. The matter in dispute was, whether an existing road should be partially altered, or not: the adjudication was against the alteration prayed for; but in favor of a new road, where the alteration was requested; a new road there not being prayed for. *In form*, therefore, it appears that the adjudication was not of the matter in dispute. Whether it was or was not *substantially*, deserves consideration.

So far as an alteration is a charge upon the town, it is reasonable they should prefer the alteration to a new road; because in this last case the old road remains a subject of repair, while the new road requires also to be made and repaired. But when there is an alteration, the part of the old road that is discontinued ceases to be a charge upon the inhabitants. It may therefore be well supposed that, when an alteration is prayed for, it may not be opposed by a

town; but their agents may unite with the petitioners in requesting it; while they would earnestly oppose a new road. With respect to individuals, whose interest may be affected, they may not oppose a new road, because the old road remains for them to pass, while they might resist an alteration, as discontinuing an old road convenient to them.

What were the particular interests or objections of the town of *Cambridge*, or of individuals, does not appear of record; nor can we inquire into them; but we are obliged to conclude that the alteration of an old way, and the establishment of a new one, are substantially different, and differently affect the opposing parties. And from this conclusion we are bound to decide that, in the case before us, the adjudication of the Court was not of the matters in dispute before them, but of a point, which does not appear from the record to have been litigated. We therefore think this adjudication was irregular.

After the record and proceedings were certified to us, the inhabitants, who moved for the *certiorari*, suggested *diminution, alleging that one of the petitioners had [* 166] given a bond to the town, to indemnify them against one half of the expenses they might incur in consequence of the granting of the petition, and had filed it in Court as an escrow, to be delivered to the inhabitants of *Cambridge*; and that the bond was one of the grounds upon which the adjudication by the Court was prayed for.

A *certiorari* was then ordered to certify the proceedings respecting this bond. That *certiorari* has been returned, on which it appears, that such a bond was executed by one of the petitioners, and delivered to the clerk, as an agent of the petitioners, to be by him delivered to the inhabitants of *Cambridge*, if they would receive the same; that this was done in open Court, without the direction of the Court, and that the bond was not filed as part of the proceedings in this cause.

From the return it is manifest that, if the execution of the bond, and the placing of it with the clerk, had any indirect influence on the opinion of the court below, it can have no influence upon our decision, as it is no part of the record and proceedings in this cause. Probably the transaction was had with the intention, on the part of the petitioners, that it might operate as evidence to the court, that the damages, which the town might suffer if the petitioners prevailed, would be reduced one moiety; so that the magnitude of these damages might not operate on the minds of the judges.

Although we do not impute any intentional misconduct to the petitioners, yet we are obliged to declare a practice of this kind irregular; and if it be usual, as has been suggested, we trust it will

no longer be continued. Evidence to show that the damages will not be greater on the one side, than the public convenience on the other, cannot be objected to. But evidence that an individual, for his own private advantage, will defray a part of the damage actually incurred, and which he is not obliged by law to defray, is very improper.

[* 167] *The way prayed for ought to be of common convenience and necessity. By necessity is not to be understood absolute physical necessity; but so great a public benefit, that the want of the way is a great public inconvenience. Now the town, who have to pay the damages, form a part of the public; and it is but reasonable for the Court to compare the extent of the damages to be incurred with the advantage to be received. And certainly although there may be a public advantage, yet it may be very small, and no equivalent for the damages, with which it is purchased.

We further observe that every individual is injured, if his land is encumbered with an easement against his consent, which is not required by the public necessity or convenience; although he may receive a fairly-estimated compensation. But if one or more persons may take upon themselves the payment of this compensation, to obtain a way for their own emolument, the owner of the land is made to submit to an encumbrance, not for the sake of the public, but for the sake of private persons or corporations, who invade his rights for their own benefit, but in the name of the public.

These observations are intended to apply to cases where private persons or corporations prevail on towns to lay out town ways, colorably for the use of the inhabitants, but really for their own benefit, over lands of others who are opposed to the way. In this last case a jury may discontinue a way thus irregularly obtained; and they ought to do it, whenever they are satisfied that private emolument, and not the interest of the inhabitants, has caused the way to be located. (a)

But we wish it to be remembered, that we impute no irregularity to the declaration of any owner of land, over which the way is prayed for, that his private benefit from the way is equal to any damage he may sustain; and that therefore he will claim no damages. Nor do we extend these remarks to a *bonâ fide* charitable donation to a town or plantation, to relieve it under burdens necessarily imposed for the public benefit.

(a) [And see *Commonwealth vs. Sawin*, 2 Pick. 547. But see *Parks vs. Boston*, 8 Pick. 218. — *Jones vs. Andover*, 9 Pick. 146. — *Freetown vs. Bristol Co Comm.* 9 Pick. 46. — Ed.]

* Upon the whole, it is our opinion that the court [* 168] below acted irregularly in not causing the proprietors of *West Boston bridge* and *William Gray* to be notified before further proceedings were had, contrary to their own order, no reason being assigned for rescinding that order. And because the court adjudged a new highway to be of common convenience and necessity, when no new highway was prayed for. For these causes the proceedings must be quashed.

COMMONWEALTH *versus* WILLIAM MERIAM.

Where one who had been committed to the house of correction, as being a person dangerous to be permitted to go at large, was brought from the house of correction by order of Court, and tried and acquitted on an indictment for murder, he was remanded by the Court to the place from whence he had been brought.

THE prisoner was indicted for the wilful murder of one *David Bacon*, by shooting him. Upon his arraignment he pleaded not guilty, and was tried at this term. The defence set up by his counsel was insanity, and he was acquitted by the jury.

From the evidence on the trial, it appeared that he had been occasionally deranged for several years before committing the fact for which he was indicted; in consequence of which, a guardian had been, by the judge of probate for this county, appointed to take care of his person and estate, pursuant to the provisions of the statute of 1783, c. 38, § 4. After the death of *Bacon*, the prisoner had been committed to the house of correction, by two justices of the peace, *quorum unus*, as a person whom it was dangerous to the safety of the people to permit to go at large, agreeably to the statute of 1797, c. 62, § 3. After the indictment was found, he was brought from the house of correction to the court-house for his trial; and upon his acquittal the court committed him to the custody of the sheriff, to be by him remanded to the place from whence he was taken, there to remain until he should be thence discharged by due order of law.

The solicitor general for the commonwealth.

Locke for the prisoner.

* ELISHA WHEELER, in Scire Facias, *versus* DANIEL WHEELER.

An administrator may surrender a principal, for whom his intestate was bail.

THE defendant was bail for one *Benjamin Turner*, and having died since the service of the *scire facias* upon him, administration of his estate had been committed to *Elijah Fiske*, who, having been admitted to defend in this action, moved for leave to surrender *Turner*, in discharge of the bail bond. The motion was granted, and *Turner* was committed in order to his being charged in execution, according to the statute of 1784, c. 10, § 2.

ISAAC RIDDLE *versus* THE PROPRIETORS OF THE LOCKS AND CANALS ON MERRIMACK RIVER.

In an action against the proprietors of a canal, who were bound by their incorporation to construct their canal so deep and wide, that rafts of a certain description could pass through it when the same could pass the river with which it was connected; it was held that they were liable to the owner of a raft of such description, having received toll thereof, for all the damages he sustained in consequence of the canal not being sufficient to pass the raft, without evidence that it could have passed the river.

An action of trespass upon the case will lie against a corporation aggregate, for neglect of a corporate duty, by which the plaintiff suffers.

THE declaration was in case, "for that whereas on the tenth day of November last past, there was, and for a long time had been, and still is, a certain canal in *Chelmsford*, in said county of *Middlesex*, belonging to the said proprietors, leading from and out of the said *Merrimack* river, near the head of *Patucket* falls, so called, in said river, and communicating with the same river below said falls; which same canal then was, for a long time had been, and still is the right of all passengers, with their property, to pass through, paying the toll by law established therefor; and which same canal then was, and still is, the only passage by which rafts, masts, and floats of timber, could, or may, pass securely by or through the said falls; and whereas, by a certain act or law of this commonwealth, made and passed on the twenty-seventh day of

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June, in the year of our Lord seventeen hundred and ninety-two, *entitled "*An act to incorporate Dudley [* 170] Atkins Tyng, Esq., and others, for the purpose of rendering Merrimack river passable with boats, rafts, and masts, from the divisional line of New Hampshire and Massachusetts, to the tide-waters of said river, by the name of the proprietors of the locks and canals on Merrimack river,*" it is among other things enacted, "that the said proprietors shall erect, make, and forever maintain, such dams, canals, and locks, and shall so clear the passages of the river aforesaid, from the northerly line of this commonwealth, to the tide waters of said river, as that masts, rafts, and floats of timber, not exceeding twenty-five feet in width, and one hundred feet in length, may pass securely down, and that boats, not drawing more than three feet of water, may pass securely up and down, at all seasons of the year, when the other parts of the said river are passable for the same;" and whereas the plaintiff, on the said tenth of November, at said *Chelmsford*, was possessed of a certain raft, not exceeding twenty-five feet in width, and one hundred feet in length, lying near the head of said canal, and with which he was then and there desirous to pass through the same canal, and for the passage of which he then and there paid the toll, by law due and payable to the said proprietors. And the plaintiff avers that the other parts of the river were, on the said tenth day of November last, passable for the same raft, viz. at said *Chelmsford*; yet the said proprietors, in no wise ignorant of the premises, but unmindful of their duty in this behalf, on the said tenth day of November, and for a long time before, did omit to open, and dig the same canal of a depth sufficient for boats, rafts, masts, and floats of timber, to pass and float thereon as aforesaid; and did permit the same canal to remain in a ruinous and decayed state, and out of repair, and the passage thereof to become and remain choked, and filled up, and impassable, viz. at *Chelmsford* aforesaid, whereby the said raft of the plaintiff then and there, in passing through the same canal, became set, grounded, *and [* 171] stuck fast, in the same canal, in such manner that the same could neither be moved up nor down the same canal; by reason whereof the same raft was greatly damaged and injured, and the plaintiff put to great cost, expense, and trouble, in endeavoring to force the same raft through the said canal; and was delayed and hindered for a long time, viz. for the space of twenty days, and was all that time put to great expense in the support of himself, his laborers, men, and servants; all which is to the damage of the plaintiff, as he saith, the sum of five hundred dollars."

The action was tried upon the general issue, at the sittings after

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October term, 1808, before *Parker, J.*, who reported that the plaintiff proved at the trial, that in November, 1805, he was proceeding down *Merrimack* river, with a raft of lumber, not exceeding in dimensions those described in the act, by which the defendants were incorporated; that he paid to the toll-gatherer of the said proprietors the toll prescribed, by the same act, for a passage through the said canal; that the raft, having entered the canal about half its length, grounded, and could not be got through; but that the plaintiff was obliged to break up the raft, and transport by land a considerable part of it over the carrying-place. This was owing to obstructions in the canal, or want of water, because it was not dug sufficiently deep. The plaintiff left the raft in the canal, and returned home with his men, for the purpose of waiting until there should be sufficient water to remove his raft; and while he was gone, a storm happened, which occasioned the loss of a quantity of wood, which the jury were directed to estimate in the damages. Several witnesses, accustomed to rafting in that river, testified that at this time there was sufficient water below, to have carried the raft down to the tide-waters. Others swore that they believed there was not water enough to carry the raft over *Hunt's* falls. The judge directed the jury that it was immaterial what the state of the falls below was; that it was the duty of the proprietors [* 172] to keep their canal in proper order; and that *the receiving of toll amounted to an undertaking that the canal was passable. The judge also instructed the jury, that they should assess damages for all the loss, damage, and expense, proved to have been the consequence of this misfortune.

The jury returned a verdict for the plaintiff, and the defendants moved for a new trial, for a misdirection of the judge in matter of law.

The cause standing for argument, at the last October term in this county, *Channing* and *Stearns*, of counsel for the defendants, suggested that, in addition to the motion for a new trial, they should also ask to be heard in arrest of judgment; and the Court directed them first to argue their motion for a new trial.

Channing. We contend that, upon this declaration and in this form of action, the evidence admitted at the trial ought not to have been received; and that for want of evidence proper to support the action, the defendants were entitled to a verdict. All the damage or injury, that may be proved in this action, must be a direct injury, and not consequential, and must also be included in the declaration. The evidence admitted at the trial went to prove an injury altogether consequential, and that by the choice of the plaintiff himself, and to prove damages not included in the declaration.

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All the authorities are express, that, in case of a public nuisance, an individual can have an action only, where he suffers a direct, immediate injury, and not a consequential one; as, for instance, the loss of his horse, or some corporeal hurt to himself, in falling into a ditch in the highway. In *Carthew*, 194, it is expressly laid down, that where the defendant was bound to keep a ferry, and did not maintain it, and the plaintiff brought his action, it was held he could not support his action upon evidence that he was delayed in prosecuting his business, and thereby injured. Lord Coke (1) says, if a ditch is dug in the road, so that people cannot pass, but are obliged to go round, &c., no action lies. * And [* 173] in *Hubert vs. Graves*, (2) where the plaintiff was a timber merchant, and the defendant had laid so much rubbish in the highway that the plaintiff could not get to his lumber-yard, and was obliged to go round in a circuitous and inconvenient way, Lord Kenyon decided that no action lay.

Now, the declaration in the present case alleges nothing more than that the plaintiff was delayed in getting his raft through the canal. For it may fairly be implied, that, notwithstanding the obstacles, he did get it through. All the inconvenience and labor, which the state of the canal occasioned him, was such as was common to every one, who should attempt to pass it.

The evidence admitted by the judge did not support any of the allegations in the declaration, but made a totally different case. The declaration states that the raft was fixed immovably, and thereby damaged. Under this allegation the plaintiff proved no immediate injury to his raft. The evidence was, that while the raft was thus fixed, the plaintiff left it; and in his absence a storm happened, which broke the raft, in consequence of which some wood was lost. It was the folly of the plaintiff thus to leave his raft, without any care for its preservation; and where a damage is incurred, by the negligence and folly of the party, he is certainly not entitled to an action for such damage. (3) Even if the declaration had specially stated such a loss, the jury would not be justified in assessing damages for it.

The next allegation is, that the plaintiff was put to costs and expense in endeavoring to force the raft through the canal. Under this allegation, the plaintiff was permitted to prove his costs, expense, and labor, in carting his lumber over the carrying-place. There is no consistency between the *allegata* and *probata*.

The principle, on which the foregoing objections are founded, is

(1) *Co. Lit.* 56, a.(2) 1 *Esp. Rep.* 148.(3) 2 *Lev.* 196, *Virtue vs Bird*

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well elucidated in the case of *Hullman vs. Bennett*. (4) The declaration there was, that the defendant managed and [* 174] steered his vessel with so much negligence, *that he run foul of the plaintiff's vessel, and occasioned the injury complained of. The evidence was, that the ships, sailing in different directions, struck each other, and, owing to the anchor of the defendant's ship negligently hanging low over her bows, the fluke of the anchor broke through the side of the plaintiff's ship, and occasioned the injury. Lord *Ellenborough* said that the evidence must correspond with the declaration; and he was of opinion that the cause, to which the declaration ascribed the damage, was not the true one, nor did the injury arise from the negligent navigation of the vessel, but the improper stowing of the anchor; and although the plaintiff might have laid the grievance in the declaration, so as to bring it within the actual cause of the injury, he thought he had not done it here. The verdict was for the defendant; and on motion in the King's Bench for a new trial, on the ground of misdirection in the judge, the court refused the rule.

But we contend for a new trial, not only for the admission of improper evidence, but also for the direction of the judge to the jury, to reject the consideration of evidence that was properly admitted.

The judge instructed the jury, that it was wholly immaterial whether the other parts of the river were passable or not, at the time the plaintiff's raft entered the canal; and, consequently, if the jury believed the evidence of the plaintiff's injury, they must find a verdict for him, although the other parts of the river were impassable.

We make two objections to this direction of the judge.

1. The plaintiff has expressly averred, in his declaration, that the other parts of the river were passable; and has thus made his right to pass the canal conditional. This right, according to his inducement, and his averments, depends on two things; the payment of toll, and the other parts of the river being passable. As these are both requisite to his right according to the declaration, we might have traversed either of them specially, and such plea would have been good. But the general issue is a special [* 175] *traverse of every allegation in the declaration, which is not wholly irrelevant to the complaint. As the plaintiff has made this allegation a part of his title, he is held to prove it. (5)

(4) 5 *Exp. Rep.* 227.

(5) *Doug.* 664, *Bristow vs. Wright & Al.* — 2 *W. Black.* 1101, *Savage, qui tam, vs Smith.*

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2. But further, this allegation was necessary; for by the act incorporating the defendants, they are not answerable, unless the other parts of the river were passable at the time the plaintiff's raft entered the canal; and if this averment had not been made, we should have demurred, on the ground that, without it, the plaintiff would not have shown any cause of action.

The payment and receipt of the toll formed but one of the conditions, on which the plaintiff's right to pass the canal rested; the other, and an equally essential one, was that the other parts of the river were passable. Our receiving the toll could amount to nothing more than an implied engagement, that the plaintiff should pass his raft when the river below was passable. Any other engagement would have been idle and useless to him, and wholly beyond the intentions and requisitions of the act of incorporation. It was his duty to wait for such a state of the river. Nothing is of more frequent occurrence, than circumstances like this. One pays for a passage in the mail stage, which is regularly to start at a precise hour. He demands his passage; the stageman waits for the mail; and by this delay the passenger arrives too late, and loses the object of his journey. One buys a ticket for the theatre, but he does not expect admission, until the doors are opened according to the bills. One pays his toll at a bridge, but the draw is raised, and he is detained an hour, by which he loses the purchase of an estate at auction. In all these, and a thousand other cases, the payment of money conveys no immediate right, but a right according to the contract. And what was the contract in the case at bar? that the raft should pass, when the other parts of the river were passable. The time will be rendered certain by the event, although at the time of the contract it is uncertain. If we *should [* 176] suppose, then, that the other passages of the river were passable on the first of December, the contract was that the raft should pass on that day. Such is the language of the plaintiff's declaration; such is the language of the law; and such, therefore, we apprehend, must be the language of the Court.

But we contend further that the plaintiff is not entitled to any action. The persons incorporated were under no obligation to make a canal. If they neglected it for a limited period, the grant was vacated. If they did make it, as its existence is not pretended to be a nuisance, or in any way to injure the public, for which an advantage was due to the public, there is no claim of the public upon them. And as they have no right to insist on any person's using the canal, the obligation, if there be any, is not reciprocal.

The act of incorporation contains a proviso, that all the grants therein are to be void, unless the corporation complete the canal by

a certain period, extended afterwards by an additional act to a second period, long since elapsed. The declaration states that until the 10th of November, 1805, the corporation had omitted and neglected to make, dig, and open the canal. Now, on this averment, the charter is null and void, by the plaintiff's own showing, and the corporation was dissolved before he commenced his action.

Stearns contended that judgment must be arrested.

1. Because an action in the present form is not maintainable against a corporation. At common law no action lies against a corporation for a tort. The distinction is between actions *ex contractu* and *ex delicto*. The former are maintainable by or against a corporation; the latter lies for a corporation, but not *against* it.

There is an important distinction between the rights and duties of natural persons and corporations; and many actions and forms of process, to which individuals are liable, are inapplicable to corporate bodies. Trespass does not lie against them, (6) nor attachment. (7) They cannot be outlawed. (8) They are [* 177] not liable to replevin; (9) nor can *they be declared against *in custodia mareschalli*. (10) If all the members join in committing a disseisin, the corporation cannot be sued; and generally, for all wrongs they are to be proceeded against individually. (11) One reason why trespass does not lie is, that at common law the process was *capias*, and the plaintiff might proceed to outlawry. But the principal reason is, that judgment against the defendant in trespass, always concluded with a *capiatur*; and it would be absurd to render such a judgment against a corporation. This objection applies not only to actions of trespass *vi et armis*, but to all actions of trespass on the case arising *ex delicto*, where the plea would be, as in this case, *not guilty*.

The action of trespass on the case, in its origin, was merely an extension of the action of trespass *vi et armis*. The old writ of trespass being applicable only in a few instances, it was attempted to enlarge its scope, so as to adapt it to every man's case. And the statute of *Westminster*, 2, authorizing writs to be framed *in consimili casu*, afforded a convenient opportunity for extending this remedy. But the ancient form of the writ was still followed. And, during the reign of *Edward 3*, it was usual to lay the special action, even in cases of negligence and nonfeasance, *vi et armis* and *contra pacem*. (12) From the cases of this description, which are numerous in the old books, it is clear that this action would lie only

(6) *Bro. Corp.* 63. — 22 *Ass* 67.

(7) *Raym.* 152.

(8) 10 *Co.* 32.

(9) *Brotonl.* 175.

(10) 6 *Mod.* 183.

(11) *Salk.* 192

(12) 22 *Ass.* 41. — 42 *Edw.* 3, 13. — 46 *Edw.* 3, 19, &c

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where trespass would, and consequently not against a corporation.

The modern action on the case for a nuisance was derived, much in the same way, from the old assize of nuisance. And as this remedy did not lie against a corporation, because it could not commit a disseisin, it was held by analogy that the action on the case for a nuisance did not lie. (13) The rule of the common law seems to be, that all actions arising from torts, which are merely personal, and which would not survive against an executor, do not lie against a corporation. The same reason holds in both cases. Neither the members of a corporation, (14) nor executors and *administrators, (15) are liable to *capias*. And the [* 178] original reason for deciding that executors should not be liable to actions of this description, was to protect the person of the executor from the process of *capias*, and not to prevent the testator's property being answerable for the injuries committed by him. The maxim of the civil law, *actio personalis moritur cum personâ*, was adopted long since the law on this subject was established, and is not generally true.

But if it be said that the reason executors are not liable for the torts committed by their testators is, because none but the wrongdoer is answerable for his personal wrongs and neglects, the same reason applies with equal force to our case. The corporation is made up of a succession of individuals perpetually changing. And if a wrong be committed, the existing members should be personally answerable for it, and not the individuals who happen at a future time to compose the corporation. The reasoning of Lord Mansfield, in the case of *Hambly vs. Trott*, (16) applies as well to corporations as to executors. "The form of the action is decisive. The plea is, that the testator is not guilty; and the issue is to try the guilt of the testator." For it would be absurd and incongruous to try the guilt of a testator, in an action against his personal representative, because torts are personal, and none but the individuals committing them are liable; it is certainly not less so to try *the guilt of a corporation*. (17)

2. The injury complained of is in the nature of a public nuisance. If the corporation is obliged to repair, it is in the same way that towns are bound to repair highways. The declaration states that the canal is a common passage; and a common passage is the same

(13) 1 *Reeves, Hist. C. L.* 345.

(15) *Yelv.* 53.

(14) *Bro. Corp.* 43.

(16) *Coop.* 377.

(17) See the argument of Sir G. Treby, in the case of *Rez vs. The City of London & St. Trials*, 570.

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as a common highway. (18) For an injury occasioned by a highway being out of repair, an action of the case does not lie at common law. (19) Where a common way is not repaired, so that I mire my horse, or the like, I shall not have an action [* 179] against him who * ought to repair, but it shall be performed by presentment. (20) A highway being stopped, so that a man is delayed in his journey, and hindered in some important business—this is not a damage, for which case lies. For it must be direct, and not consequential, as, for instance, the loss of a horse, or some corporeal hurt. (21) Where it is *ad commune nocumentum*, the plaintiff must show a special and direct damage, or a particular right, or the action will not lie. (22) In all cases, in which this action has been maintained, there was a particular right, and the action lies without a *per quod*. (23)

It was said by Powell, J., in *Ashby vs. White*, (24) that where an indictment would lie, in a case like the present, no action could be maintained; and that the reason, why the court sustained the action of *Westbury vs. Powell*, (25) was because there was no other remedy.

It should be observed, that the cases, in which this action has been held to lie, were for an actual obstruction by an *individual*, being a mere stranger, which is entirely different from an omission of a duty, by a *corporation*, liable to repair, and proprietors of the way to be repaired. This being the omission of a duty in which the public are interested, the remedy is by indictment, and not by action.

The sense of the legislature, expressed in their acts, is often referred to, as explaining the law. All the late turnpike acts provide that the corporation shall be liable to an action, as well as an indictment, for injuries occasioned by defective roads and bridges. If this action lies at common law, the provision was unnecessary. But by making this distinction between turnpikes and canals, the legislature intended a benefit to the latter.

2. The plaintiff has founded his action on the act of incorporation, which thereby becomes a part of the case. By the provision of the last section of the act, if the corporation shall, for a certain

(18) 4 Mod. 294.

(19) Co. Lit. 56, a. — 1 Esp. Rep. 148. — 1 Mall. Mod. Ent. 400, 402.

(20) Per Haydon, J., Bro. Act. sur le case, cites 5 Edw. 4, 3.

(21) Carth. 194. — 3 Mod. Ent. 289, 294. — 1 Salk. 12. — 1 Morgan's Vade Mecum, 79.

(22) Cro. Eliz. 664. — Com. Rep. 58. — L. Raym. 486, S. C.

(23) Per Holt, C. J., 1 Salk. 16.

(25) Cited in Cro. Eliz. 654.

(24) 6 Mod. 50

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time, neglect to make and complete the canal, the act is to be void, and the corporation created by it dies of course. The plaintiff avers that the *corporation did so neglect. By [* 180] his own showing, then, the act, on which this action is founded, is void, and the declaration is *felo de se*. The defendants might have alleged this non-compliance with the terms of their charter in their defence. (26) And as they might have pleaded it *a fortiori* they may avail themselves of it, when shown by the plaintiff. The acceptance of the charter could not make the defendants liable to suits, until they availed themselves of it, by making and completing their canal. And if, as the plaintiff avers, they have never made it, they are not yet liable, and the judgment must be arrested.

The action was further continued to this term, and now

W. M. Richardson argued for the plaintiff, in support of the action.

It was said by the defendants, that trespass on the case does not lie against a corporation, because formerly this action was laid *vi et armis* and *contra pacem*, and a *capiat* was awarded, which could not be against a corporation. But however this might have been in ancient times, the action is never so laid now, nor such a judgment entered.

As early as the reign of *Elizabeth*, there was an action on the case against an officer of the Queen's Bench for a misfeasance, which was not so laid, and in which judgment was given for the plaintiff, and the defendant in *miser cordia*. (27) It is singular, that case for nonfeasance should ever have been laid *vi et armis*. In *Fitzherbert* (28) there is the form of a writ of trespass on the case, but no mention of *vi et armis* or *contra pacem*. The statute of 5 and 6 *W. & M.*, has taken away the fine in all cases, and no notice is ever taken of it in the judgment, (29) and the objection no longer exists.

It is no sufficient objection to an action, that no such action was ever brought before. (30) The reason why no action against a corporation is to be found in the *English* books, in which the plea was *not guilty*, unless given by statute, probably is, that corporations were anciently not common, and the necessity did not exist. As they are *now multiplying among us beyond [* 181] all former examples, and as individuals may frequently

(26) 3 Bro. P. C. 465, *Harrison vs. Evans*. — 2 Stra. 1155, *Bower vs. Hampton*. — Dougl. 738, *Loose vs. Walker*. — 5 Mass. Rep. 286, *Bayley & Al. vs. Taber & Al.*

(27) Co. Ent. 15, pl. 13. — See, also, *Ibid.* 9, pl. 8. — 11, pl. 8, 9. — 8 Co. Rep. 596.

(28) N. B. 92.

(29) 1 Salk. 54. — 3 Black. Comm. 399.

(30) Cro. Jac. 478.

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sustain injuries from their neglect to do what the law has made it their duty to do, there is good reason why this form of action should be maintainable against them, and there is no good reason why it should not.

It was objected that the plaintiff has sustained no injury, for which an action will lie. It is laid down by Lord Coke, (31) "If any man be disturbed to go in a common way, or if a ditch be made overthwart such way, so as he cannot go, yet he shall not have an action upon the case." The reason assigned is, "for avoiding multiplicity of suits." But if he receive any special damage, not common to others, he may have an action. (32) The only difficulty seems to be, to determine what amounts to such special damages as will maintain the action. The case of *Iveson vs. Moore* (33) was for stopping a way, so that customers could not come to the plaintiff's colliery. The Court of King's Bench were divided, but it was afterwards settled, by all the justices of the Common Pleas and barons of the Exchequer, that the action well lay. In *Hubert vs. Groves*, cited for the defendants, the plaintiff was nonsuit, because it appeared, on the face of his declaration, that he had sustained no particular damage. The case of *Paine vs. Partridge*, cited from *Carthew*, was decided on the same ground. The case of *Hart vs. Basset* (34) is strongly in favor of the plaintiff. Indeed, in all the authorities on this subject, there seems to have been little or no diversity of opinion among the judges, as to the general rule which ought to govern in these cases; the only doubt has been, whether, in some of the cases, there was particular damage or not. In the case at bar, the plaintiff has alleged that his raft was injured in consequence of the neglect of the defendants. If the damage done to this raft were not a particular injury to the plaintiff, it would be difficult to imagine a case in which he could sustain a particular injury.

[* 182] * Another and very singular exception was urged for arresting the judgment in this case. It was said that the corporation no longer exists. It is not easy to reply seriously to this exception. If they have ceased to exist, it may be inquired, Who demands and receives toll for passing the canal? Who have authorized the learned counsel to appear in this action, to plead, to argue, and to move in arrest of judgment? If the corporation, there is an end at once to the exception. However the neglect of this corporation to make a canal might be the ground of an informa-

(31) *Co. Lit.* 56. b.

(32) 5 *Co. Rep.* 72, *Williams's case*. — *Cro. Jac.* 446, 491. — 9 *Co.* 113.

(33) 1 *L. Raym.* 486. — 1 *Salk.* 15. S. C. (34) *T. Jon.* 157. — *Carth.* 85. S. C

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tion to dissolve it, it certainly lies not in the mouths of its members to say it is thereby dissolved, and thus take advantage of their own wrong. It was gravely said, that if this corporation had never made a canal at all, the plaintiff could have had no action. This is true; but it is equally true, that in such a case the plaintiff's raft could never have been injured. The true construction of the statute is, that in case of neglect the corporation shall cease to derive any advantage from certain parts of the act; not that it is dissolved.

The action was continued *nisi*, and at the November term in *Suffolk*, the opinion of the Court was delivered by

PARSONS, C. J. (after a brief recital of the declaration.) The cause was tried on the general issue, and a verdict was found for the plaintiff agreeably to the judge's direction.

The defendants have moved for a new trial for the misdirection of the judge in a matter of law; and they have also moved in arrest of judgment for the insufficiency of the declaration.

It appearing from the judge's report, that while the raft remained stuck fast in the canal, a storm came, by which some wood, forming part of the raft, was lost, and some witnesses swore that there was water enough in the river for the raft to pass to the tide waters; but others swore that there was not water enough for the raft to pass over *Hunt's falls*,—the judge directed the jury that they should give *in damages the value of the [* 183] wood lost, and that the receipt of the toll was sufficient evidence against the proprietors, that the water was sufficient for the raft to pass.

The defendants have urged, that the wood lost ought not to be estimated in assessing the damages, for two reasons.

1. That the loss of the wood is not alleged as any part of the damages. This objection, we think, ought not to prevail. The allegation is, that by the sticking fast of the raft it was greatly damaged and injured. But a raft may be injured, not only by being broken, but also by a loss of a part of the materials of which it is composed. The allegation is therefore sufficient.

2. That the loss of the wood was owing to the plaintiff's own neglect. If this were true, he certainly ought not to have recovered damages for that loss. The defendants have cited the case of *Virtue vs. Bird*, as supporting this objection. There the plaintiff had contracted with the defendant to haul a load of wood to *T.* and there deliver it at some convenient place, which the defendant should appoint. The plaintiff complained that through the neglect of the defendant to appoint a place, his cattle remained so long as to be greatly injured. But the action did not lie, because the defendant might have unharnessed his cattle, or might have laid the timber in

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any convenient place he thought proper. But, in the present case, what relief was in the plaintiff's power, which he improperly neglected? Ought he, when his raft was aground, to have taken his lumber on shore, and have abandoned his attempt to pass the canal? Or might he not have prudently waited for more water to enable him to pass? In our opinion, his conduct was prudent, not only as it regarded his own interest, but also the interest of the proprietors; as the expense of transporting the whole contents of the raft by land to the bottom of the falls must have been considerable. However, while prudently waiting, a storm came, by which the wood was lost. This misfortune must fall on the defendants; as it did not arise from the imprudent neglect of the plaintiff.

[* 184] * It is also objected, that the plaintiff ought to have been holden strictly to prove, that the other parts of the river were passable for his raft, notwithstanding the defendants had received the toll. But we are of opinion that, when the defendants received a toll, which they could not lawfully receive unless the other parts of the river had been passable for this raft, they shall not be admitted to allege any illegality of their own in their own defence.

Notwithstanding the general duty of the proprietors to render the river navigable for these rafts, and for boats from the northerly line of the state, to the head of the tide over *Patucket* and *Wickasic* falls, and also over *Hunt's*, *Varnum's*, and other falls; yet it also appears, that if the proprietors neglected for a certain time to make the locks and canals over *Patucket* and *Wickasic* falls, their powers as to these falls were vacated; while their powers as to those other falls remained. So if the other falls were not made navigable at a certain time, their powers respecting them failed, and their other powers remained.

Now, we cannot presume that any of these powers had become void without evidence. The objection, therefore, that *Hunt's* falls were not passable, is immaterial; for it was the duty of the proprietors to keep *Hunt's* falls navigable. Neither of the objections to the verdict can therefore prevail.

We now come to the motion in arrest of judgment, which has been made on two grounds.

The first is, that it is not the duty of the defendants to keep the canal in repair, sufficient for the passage of rafts and boats of the description mentioned in the declaration. This ground is endeavored to be maintained on the supposition that the powers granted to the corporation were a privilege, which might be waived or exercised at its discretion. But we think this supposition is not correct. When the act of incorporation first passed, it was optional with the

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proprietors, whether they would or would not take the benefit of it ; but after they had made their * election, [* 185] by executing the powers granted and claiming the toll, then the duties imposed by the tenth section, to make the canals, &c., attached ; from which they cannot be discharged, but by a seizure of the franchise into the hands of the government, or by a repeal of the act with their assent.

But further to maintain this ground, the defendants have argued that, from the plaintiff's own showing, it is not the duty of the corporation to keep this canal in repair. By the statutes relating to this subject, if the corporation did not open this canal in seven years, for the passage of rafts and boats, then their powers as to this canal ceased. Now, the plaintiff alleges, say the defendants, that when the injury complained of happened, which was more than seven years from the passing of the statutes, the proprietors had then, and for a long time before, neglected to open and dig this canal.

If we were obliged to adopt the construction of the plaintiff's allegation, on which the defendants insist, the objection ought to prevail. But attending to other parts of the declaration, we find it averred that this canal belonged to the proprietors, and that they, unmindful of their duty, neglected to open and dig the same of a sufficient depth, and permitted it to remain in a decayed state, and out of repair, and the passage to become and remain choked and filled up. We are now considering the declaration after a verdict ; and the fair construction of this allegation is, not that they never opened and dug the canal sufficiently, but that they neglected to open it by digging and removing the collection of matters, which choked it and obstructed the passage. We are, therefore, satisfied that the motion in arrest cannot prevail on the ground we have been considering.

The other ground is, that no action lies against a corporation for a breach of its duty, by any person specially injured by the breach ; and that the only remedy is by information or indictment. This point has been argued by the * defendants' counsel [* 186] with much ability ; and has had all the attention we could give it, in the short time the constitution of this Court has allowed us.

The argument, when compressed, is, that corporations having only a legal, and not a natural body, no *capiatur* lies against them ; that in all actions of trespass and trespass on the case, where the general issue is not guilty, if judgment be against the defendant, a part of the judgment at common law is an entry of a *capiatur* ; that, therefore, no such actions lie against a corporation at common law ; and

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the statute, taking away the necessity of the entry of a *capiatur*, does not authorize an action which did not lie before.

That a process to take the body of a corporation does not lie, is certainly true ; but the defendants must show that in all actions of trespass, a *capiatur* against the defendant may, from the nature of the action, be entered. In 21 *Edw.* 4, 7, 12, 27, 67, it is holden that a corporation cannot be beaten, nor beat, nor commit treason or felony, nor be imprisoned for a disseisin with force, nor be outlawed, nor a *capias* in debt be awarded against them. These principles result from the nature of an aggregate corporation.

But the defendants have relied on an opinion of *Thorp*, J., in 22 *Ass. pl.* 67. He there says that trespass does not lie against a corporation aggregate by its corporate name, for a *capias* and *exigent* do not lie against it. That a *capias* and *exigent* do not lie against a corporation, is evident ; but that no action of trespass lies, is questionable. For it is agreed that a corporation may be fined on indictment, and the fine levied by distress ; and why may not a corporation be amerced, and the amercement collected in the same manner ? This has led us to look into the ancient law on this subject ; and we find *Thorp's* opinion overruled as to certain trespasses. In 31 *Ass. pl.* 19, a corporation are holden answerable in assize as a disseisor with force. In 8 *H.* 6, 1, 14, 6, an aggregate [* 187] corporation was holden answerable * in trespass for distraining the plaintiff's cattle, until he paid a toll which he was not bound to pay. Several other cases are mentioned in *Thelol's Dig. lib.* 4, c. 13, as trespass against a corporation for disturbing the plaintiff in the profits of his liberties ; or for disturbing him in holding a leet. It is therefore very clear, from the examination of the old books, that some actions of trespass might, at common law, be maintained against aggregate corporations. And, as in these actions no *capiatur* could be entered, the omission of this entry can be no objection to actions of trespass on the case. The foundation of the defendants' argument seems to fail them.

Let us now leave the ancient cases, and resort to the maxims of the common law, which are founded in good sense and substantial justice. It is one of these maxims, that a man specially injured by the breach of duty in another, shall have his remedy by action. If the breach of duty be by an individual, there is no question ; and why should a corporation, receiving its corporate powers and obliged by its corporate duties with its own consent, be an exception, when it has, or must be supposed to have, an equivalent for its consent ?

We distinguish between proper aggregate corporations, and the inhabitants of any district, who are by statute invested with particular powers without their consent. These are in the books some

times called *quasi* corporations. Of this description are counties and hundreds, in *England*; and counties, towns, &c., in this state. Although *quasi* corporations are liable to information or indictment, for a neglect of a public duty imposed on them by law; yet it is settled in the case of *Russel & Al. vs. Inhabitants of the County of Devon*, (35) that no private action can be maintained against them for a breach of their corporate duty, unless such action be given by statute. And the sound reason is, that, having no corporate fund, and no legal means of obtaining one, each corporator is liable to satisfy any judgment rendered against the corporation.

This burden *the common law will not impose, but in [* 188] cases where the statute is an authority, to which every man must be considered as assenting. But in regular corporations, which have, or are supposed to have, a corporate fund, this reason does not apply.

Among the modern cases, there is one which seems in its principles to apply directly to the case before us. It is the case of *The Mayor of Lynn, in error, vs. Turner*. (36) *Turner* sued the corporation of *Lynn Regis* for not repairing and cleansing a certain creek, in which the tide ebbed and flowed, as from time immemorial they had been used, by which he lost the use of his navigation. The declaration contained a number of counts, in one of which the special damage alleged was that the plaintiff was obliged to carry his corn round about. At the Common Pleas, judgment on *nil dici* was rendered on all the counts. For the plaintiff in error it was argued, that the creek, as described, was a highway; and as in one of the counts no special damage was alleged, the action did not lie. But Lord *Mansfield* and the court said that a creek, in which the tide ebbed and flowed, was not necessarily a highway; that the corporation were bound by prescription, and it might be the very condition or terms of their charter. And the judgment was affirmed. By this decision it is settled that case will lie against a corporation for neglect of a corporate duty, by which the plaintiff suffers. How far a special damage must be alleged, we need not now decide.

For the proprietors, in support of their motion, a reference was made to the several statutes creating our turnpike corporations, in which an action is given to any person specially injured by a neglect in repairing the road. This provision was cumulative, and introduced *ex majori cautela* by the framers of the bills, and is no objection to our present construction of the law.

There appears to us, upon the whole, no sufficient ground to stay

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judgment; and, as the exceptions to the verdict cannot prevail, the plaintiff must have judgment. (a)

Judgment on the verdict.

(a) [Vide *Yarborough & Al. vs. The Gov. and Comp. of Bank of England*, 16 East, 6. — *Chestnut Hill Corp. vs. Rutter*, 4 Searj. & R. 6. — *Townsend vs. Susquehanna Turnpike Corp.*, 6 Johns. 90. — *Angell & Ames*, 220. — Sed vide *Glover*, 96. — *Brownlow*, 175. — Ed

[* 189]

* EZEKIEL NEWHALL *versus* THADDEUS WHEELER.

A conveys land for a valuable consideration to B, C, and D, selectmen of the town of H, to them and their successors in the said trust of selectmen, for the time being, for the use of E, and, after his death, if any of the premises should remain, then to E's heirs forever; to hold, for the use aforesaid, at the discretion of the grantees; E being in possession of the premises before and after the conveyance until his death, and having devised the same to his wife in fee: — It was held that B, C, and D took a legal estate in trust for E and his heirs; that, as the legal estate was in trust, it must be commensurate with the trust, and therefore was an estate in fee simple; and that E had an equitable fee simple, which he might lawfully devise.

THIS was a writ of *entry sur disseisin*, sued by the demandant to recover his seisin in fee simple of a parcel of land in *Pepperell*, in this county, against the tenant.

The action was tried upon the general issue at the sittings here after November term, 1808, before *Parker, J.*, when a verdict was taken for the demandant, subject to the opinion of the Court upon a question reserved by the judge.

From the judge's report it appears that both parties derive their title under *Josiah Hunt*, who, being seised in fee of the premises, conveyed the same to *Joshua Simonds*, who afterwards conveyed the same by deed, expressed to be for the consideration of fifty pounds, to *Samuel Cumings*, *Leonard Whiting*, and *John Goss*, the selectmen of *Hollis*, in the state of *New Hampshire*, to them and their successors in the said trust of selectmen for the time being, for the use, benefit, and behoof of the said *Hunt*, and after his decease, if any of the premises should remain, then to *Hunt's* heirs forever; to hold for the use aforesaid, at the discretion of the grantees, with a warranty against all persons claiming under *Simonds*, the grantor. *Hunt* remained in possession of the premises from the time of executing his conveyance to *Simonds*, until his death; and he devised the same, by a will duly executed to pass real estate, to his

wife, *Elizabeth Hunt*, in fee simple, who on his death entered, claiming under that devise, and continued in possession until the premises were duly levied upon by an execution against her to satisfy the judgment creditor, whose estate in the same was legally conveyed to the demandant.

The heirs of *Simonds* were admitted to defend under the tenant.

If *Josiah Hunt* had a fee simple under *Simonds's* convey to *Cumings** and others, selectmen of *Hollis*, the verdict was to stand, and judgment to be rendered accordingly; otherwise a new trial was to be granted.

* The cause was argued at the last October term, in [* 190] this county, and again at this term by *Lawrence*, for the demandant, and *Richardson* for the tenant.

Lawrence. The tenant has no title to the demanded premises, other than his possession, except it be from the heirs of *Simonds*. It is very apparent from the deed of *Simonds*, that he intended thereby to convey all the interest he had in the premises. The demandant certainly has equity to support his title; and I trust the Court will be of opinion that the law also is in favor of it. Such construction must, however, be given to the deed, as will effectuate the intention of the parties, if it can be done consistently with the rules of law; and to effectuate the intention of the parties to this deed, it must be construed to convey an estate of inheritance in *Hunt*.

The tenant's construction of the deed is, that it is a *bargain and sale*, vesting the legal estate in *Cummings* and the other grantees, during the life of *Hunt*, in trust for him, and the remainder to *Hunt's* heirs, who take as purchasers.

Before considering the objections to this construction, I will consider the nature of a trust and use, with a view to show the difference between them.

Trusts in *England* now are what uses were before the statute of 27 Hen. 8. The object of that statute was to destroy the double property in land, which had been introduced by the invention of uses; for this purpose enacting that the legal seisin and possession should be annexed to the use. (1) The statute was intended to destroy trusts as well as uses, both being mentioned in it, and being originally synonymous terms. But the strict construction, which was at first given to the statute, in a great measure defeated its extent; as it was determined that there were some uses not executed by it. Uses of course, under the name of trusts, have continued distinct from the legal estate. The courts of equity have interfered

(1) 1 Rep. 124, a.

and supported them. (2) A trust, then, is a use not executed by the statute of uses. (3)

In *England*, by the construction given to the statute, [* 191] a * use cannot be limited upon a use. Hence it followed that, in a deed of bargain and sale to *A*, for the use of *B*, the use was not executed by the statute, but was considered a trust.

The inconveniences resulting from the rigid construction given to the statute of uses in *England*, have been in a great degree obviated in this commonwealth by the statute of 1783, c. 37, which dispenses with the ceremony of livery of seisin. A deed, therefore, made pursuant to the provisions of that statute, will now operate as a feoffment, so far as to limit a use upon a use.

The construction contended for on the part of the tenant is open to several objections.

The legal estate is in one, while another has the use; thereby creating a double property. Suppose *Cummings* and the other trustees to have died during the life of *Hunt*, the remainder could never have vested, as there would have been no person *in esse* to take. *Nemo est hæres viventis*. In that event, the remainder would be contingent, and the inheritance would be in suspension or abeyance; which is never allowed but in cases of absolute necessity. (4)

The remainder being contingent, no alienation could take place in the lifetime of the ancestor. (5)

To prevent these inconveniences, the rule in *Shelly's* case was adopted — "When the ancestor, by any gift or conveyance, takes an estate of freehold, and in the same gift or conveyance, an estate is limited, either mediately or immediately, to his heirs, in fee or in tail, in such cases, the words *his heirs* are words of limitation of the estate, and not words of purchase."

Another objection is, that we have no court, to which a *cestui que trust* could resort, to compel a trustee to a specific performance of the trust. It may be said that the *cestui que trust* might have an action at common law against the trustee. But this would not provide a specific performance of the trust; and of course the intention of the parties could not be effectuated.

[* 192] * The words "their discretion," used in the *habendum* of the deed, will not aid the tenant in his construction; as whatever was or would have been a trust at common law is since the statute of uses executed. (6) Thus a devise to trustees and their heirs, in trust to permit *A* to take the profits for his life, and

(2) 1 *Atk. Rep.* 591.

(4) *Co. Lit.* 342, a.

(5) *Ibid.*

(3) 1 *Black. Rep.* 136

(6) 1 *Vent.* 232.

afterwards to stand seised to the use of the heirs of *A's* body ; held to be an estate tail. (7)

The demandant's construction is, that the deed operates by way of feoffment, by which *Hunt* takes an estate of inheritance ; or as a release by way of *mitter le droit*, to pass all *Simonds's* right or interest in the premises to *Cummings* and others, for the use of *Hunt*

If it operate as a feoffment, the word *heirs* is a word of limitation, and not a word of purchase. The statute of uses executes a freehold estate in *Hunt* ; and he takes the remainder at common law. The freehold and the remainder are conveyed by the same deed at the same instant, and are of the same nature. Is not the same estate conveyed by the deed, that would have been conveyed, if *Hunt* had been enfeoffed for life to his own use, with remainder to his heirs ? In that case, could there have been a doubt, but that *Hunt* would have taken an estate of inheritance ? If there were any difference in the nature of the particular estate and the remainder, *heirs* would be a word of purchase. There is no difference in the nature of the two estates. They are both legal estates ; one executed by the statute of uses, the other by the common law ; both being of the same nature, but differently executed.

If the deed operate as a release, by way of *mitter le droit*, to pass *Simonds's* right or interest to *Cummings* and others for the use of *Hunt*, the word *heirs* is unnecessary, as no words of limitation are required in a release, that enures by way of *mitter le droit*. (8)

It may be said by the tenant, that the deed could not operate as a release, because *Cummings* and others were not seised, so that a use could be raised to *Hunt*.

* But it may be answered, that when the deed was [* 193] made, *Hunt* was in the possession of the premises conveyed, claiming an estate of some kind ; that the deed was made for his benefit, and is to be taken most strongly against *Simonds*, and in favor of *Hunt*. The consideration expressed in the deed being paid by *Cummings* and others to *Simonds* for the use of *Hunt*, who then had the possession, the tenant, claiming under *Simonds*, is estopped to say that *Cummings* and the others were not seised.

Whether, then, the deed shall be considered to operate as a feoffment or a release, *Hunt* took thereby an estate of inheritance, and the demandant is entitled to judgment according to the verdict.

Richardson. It is apparent, from a bare perusal of the deed in question, that the motives, which led to the adoption of that particular mode of conveyance, must have been to keep the legal estate out of the control of *Josiah Hunt*, and within the control

(7) 2 Salk. 679.

(8) Lit. § 467.

and under the direction of the selectmen of *Hollis*, during *Hunt's* life. The language of the *habendum*, that the selectmen are to hold the premises for the use of *Hunt*, at their discretion, during his life, is too clear to be misunderstood. This discretion is wholly inconsistent with a vested estate in *Hunt*.

The demandant's first position is, that this conveyance is to be construed as a feoffment; that the grant to *Cummings* and others, selectmen of *Hollis*, and their successors, gives them a fee; that the use limited to *Hunt* for life is executed in him by the statute of uses; that in the phrase, "then to his heirs forever," the word *heirs* is used, not as *designatio personæ*, but as a word of limitation; and that therefore *Hunt* took by the deed a vested estate of inheritance.

If these positions are true, the conclusion is correct. For it is admitted, as a settled principle of law, that if an estate be granted to a man for life, remainder to his heirs, or to the heirs of his body, this is (according to the words) either a fee simple or fee tail executed in such tenant of the * freehold. This rule, however, has exceptions, which it will be important to consider hereafter in the discussion of the present question.

But this construction attempted by the demandant cannot, it is apprehended, be supported; because there are no words in the instrument, that can create an estate of inheritance in *Cummings* and others. A grant to a man and his successors gives him an estate for life only. (9) The case of the chantry priest (*Co. Lit.* 9, 6,) is exactly in point. *Littleton* says, the word *heirs* only makes an estate of inheritance in all feoffments and grants. And *Coke*, in his commentary on those words, enumerates the exceptions which he says the law makes to the rule. The exceptions he enumerates clearly prove the rule applicable to the case at bar. The reason the law is so precise to prescribe certain words to create an estate of inheritance, is for avoiding uncertainty, the mother of contention and confusion; and surely this is a good reason. It is believed that there is no modern case contrary to the law, as laid down on this point by *Littleton* and *Coke*.

The estate of *Cummings* and others, then, is only for life. And it may be considered as a general rule, that the seisin of the feoffee, releasee, &c., must be commensurate with the use declared thereupon; or, in other words, *cestui que use* cannot have an estate in the use more extensive than the seisin out of which it is raised. (10) It is then clear that *Hunt* and his heirs could not take, by way of use, an estate greater than for the life of *Cummings*, *Whiting*, and

(9) *Lit.* § 1. — *Co. Lit.* 8, b. 9, a.

(10) *Saunders on Uses*, 1, 113. — *Dyer*, 186, a. — *Bacon on Uses*, 47. — *Cro. Car.* 231 *Cro. Eliz.* 721, *Crawley's case*.

Goss. Of course, the first ground taken for the demandant must be abandoned.

The demandant's second position is, that the deed of *Simonds* is to be construed as a feoffment to *Cumings* and others, during the life of *Hunt*, to *Hunt's* use ; that this use is executed in *Hunt* by the statute of uses ; that the remainder passed, by way of feoffment at common law, directly from *Simonds* to *Hunt's* heirs ; and that *Hunt* thus took a vested estate of inheritance.

* But, admitting these premises to be true, the con- [* 195] clusion does not follow. It was before admitted, as a rule of law, that when an estate is given to one for life, remainder to his heirs, he has a vested estate of inheritance. It now becomes important to state the exceptions to that rule, and the grounds and reasons of those exceptions.

Those exceptions seem all to turn upon a distinction in the use of the word *heirs*, laid down in 3 *Salk.* 292, that the words *heirs or issue*, when used to denote a *single person*, or so as to be only *designatio personæ*, are words of purchase only ; but when *collective*, they are words of limitation. One exception is, when the words *heirs or issue* have words of limitation annexed to them ; in such case they are used only as *designatio personæ*, as where a devise was to *W. R.* for life, remainder to his heirs, and the heirs female of their bodies. Here the heirs of *W. R.* take as purchasers ; otherwise the inheritance would vest in *W. R.*, and not in his heirs, which would be clearly contrary to the intent of the testator. Another exception is, where the estate for life is that of a trustee ; and as an example of this exception, suppose *Simonds* had conveyed by feoffment to *Cumings* and the others, during the life of *Hunt*, to the use of *Hunt* for life, remainder to the heirs of *Cumings* and the others. In this case, the words "*heirs of Cumings*," &c. could not be construed as words of limitation, but the heirs of *Cumings*, &c. would take by purchase. The reason is obvious. The words, by which the remainder is conveyed, denote a beneficial estate ; it would therefore be absurd to construe them as words only intended to limit another species of estate, which contained no beneficial interest. A third exception is, where the person entitled to the beneficial interest for life has not legal seisin of the freehold. Suppose *Simonds* to have conveyed by bargain and sale to *Cumings* and others, during the life of *Hunt* to *Hunt's* use for life, remainder to the heirs of *Hunt* ; this would have been an example of this last exception ; for as no use can be limited to arise out of a use, it follows that no use can be limited upon the legal estate of the bargainee. *Hunt's* estate, * therefore, must in this [* 196] case be merely that of *cestui que trust* : then, as the estate

in the remainder conveyed to the heirs must be intended to be the legal estate, if any, the word *heirs* must be construed a *designatio personæ*, and not a limitation of *Hunt's* estate. Because it would seem to be absurd to construe words, intended to designate the persons who are to take a legal estate, as a mere limitation of the estate of a *cestui que trust*.

To apply the principles which seem to govern these exceptions, to the case before the Court:—if the use were executed by the statute in *Hunt*, his estate was that of a *cestui que use*, and words limiting his estate must of necessity be limitations of the use; but, by the position taken by the demandant, the word *heirs* is used to designate who is to take, not the use, but the direct legal estate; how, then, are the words *his heirs* to be construed as words of limitations? Indeed, it seems to make no difference whether the use were executed in *Hunt* or not, because it was not the intent of the statute of uses to alter the mode of construing conveyances, but to join the legal estate and the use together. The only effect of the statute in this case would be to give *Hunt* the same estate in the land which he had in the use; and his estate in the use being only for life, the statute of course could not execute in him any greater estate. Had *Simonds* conveyed to *Cumings* and others, and their heirs, to the use of *Hunt* for life, remainder to his heirs, it would seem, in such case, that he would have had an inheritance in the use, and the statute would have executed the use accordingly. But, unless the words *his heirs* can be construed as limiting *Hunt's* estate in the use, it seems very clear, that this case cannot be affected by the statute of uses.

The tenant's position is, that the court may and ought to construe this deed as a feoffment, bargain and sale, or other species of conveyance, as may best fulfil the intention of the parties to it; that it ought to be construed as a bargain and sale, vesting in *Cumings* and others the legal estate during the life of *Hunt*, in [* 197] trust to permit him, during his life, to take * the profits, and passing the legal estate in the remainder directly from *Simonds* to *Hunt's* heirs as purchasers; and this construction will give complete effect to the intention of the parties.

There is a consideration expressed in the deed to be paid in money by *Cumings* and others. This is sufficient to raise a use to them, which the statute of uses would execute in them. The limitation of the use to *Hunt* is, it is true, void in law; but it is held in chancery to be a trust, which in conscience ought to be performed. (11) It is also true that we have no court of chancery, to compel the per-

formance of such a trust ; yet still, if the parties to a deed should deem it more proper and prudent to trust a legal estate to the conscience, honor, and honesty of three men, to dispose of the profits of the same for the use of an individual, whose capacity or habits perhaps render him unfit to have the control of real estate, there seems to be no good reason why such construction should be given to the conveyance, as wholly to defeat their intentions.

It may perhaps be objected that *Hunt's* heirs, being strangers to the consideration, cannot take the remainder by way of bargain and sale. But *Cummings* and others may well be intended to have paid the consideration, as well on account of *Hunt's* heirs, as on their own account, which would be sufficient. (12)

The action was continued *nisi* for advisement, and at the following March term in *Suffolk*, the opinion of the Court was delivered as follows, by

PARSONS, C. J. (after reciting the substance of the report of the trial, and stating the question reserved.) This cause has been very well argued on each side. The counsel for the tenant contends, that as the selectmen of *Hollis* were not a corporation to take in succession, and as the estate conveyed to them was for the use of *Josiah Hunt*, it vested in him by the statute of uses ; but as the grantees took only a life estate, a life estate only vested in *Hunt*.

* It is therefore necessary to determine what estate [* 198] the selectmen of *Hollis*, the immediate grantees, took under *Simonds's* deed. If they took an estate for the use of *Josiah Hunt* and his heirs, they took only a life estate ; for it is very clear that they are not a corporation. But if they took an estate in trust for *Hunt* and his heirs, then the legal estate of the trustees shall be commensurate with the equitable estate of the *cestui que trust*, which in this case is a fee simple.

Having no court to compel the specific performance of a trust, it is a general rule to * consider estates conveyed in trust, as estates conveyed to use, if it be not repugnant to the manifest intent of the grantor. If it be, it is considered as a trust estate, and the trustee is answerable for damages, as on an implied *assumpsit* to the *cestui que trust* that he would execute the trust—a remedy certainly very inconvenient, frequently very inadequate, and resorted to from necessity, because no court is competent to compel a specific performance of the trust.

Now, what is the manifest intention of *Simonds*, in this conveyance to the selectmen ? They are to hold the lands for the use of *Josiah*

(12) 2 *Saund. on Uses*, 55.—2 *Roll. Abr.* 784, pl. 6, 7.

Hunt, but at their discretion. It could not therefore be an estate for the use of *Hunt*; for then the use being immediately executed, *Hunt* would hold the estate during his life, not subject to any control or discretion of the selectmen. Further, they are to hold for the use of *Hunt*, and if after his decease any estate should remain, it is to go to his heirs. *Simonds* therefore contemplated that the trustees were able to sell a part, if not the whole. He therefore could not mean that the legal and equitable interest in the estate should unite in *Hunt*.

For these reasons we are of opinion, that the selectmen, who were the immediate grantees, took the legal estate in trust for *Josiah Hunt* and his heirs. Whether they could lawfully convey any part of the estate under this deed by the terms of it, although it was clearly contemplated, is not now before us; as they in fact conveyed no part of the premises. As the estate of the grantees was in trust, it must be commensurate to the trust, and therefore was an estate in fee simple.

Josiah Hunt had then an equitable fee simple, which he might lawfully devise; and upon his death, his widow had under his will the same equitable estate, which the judgment creditor and his assigns may lawfully claim against her. And no person can set up the legal estate against the equitable estate, but the trustees, or some persons claiming under them.

But in this case, neither the tenant nor *Simonds's* heirs claim under the trustees; as to them, therefore, the equitable estate of *Josiah Hunt*, his devisee, and her assigns, they having the actual possession, is sufficient to maintain this action. For the actual possession is *prima facie* evidence of a legal seisin; and a stranger to the trust shall not be permitted to control this evidence, by proving the existence of the trust estate.

Let judgment therefore be entered on the verdict. (a)

(a) [If the selectmen took in their politic capacity, it would seem, that the words "successors," in this case, might be as available, as in the case of a dean and chapter, bishop, parson, or vicar. (2 *Bart.* 11.) But, at any rate, it is quite clear, that if they took any thing, according to the intent of the grantor, they took in trust for *Hunt*, for and during his life, and for his heirs after his death. What the learned judge means, when he says, that *Joseph Hunt* had an equitable fee simple, is not very intelligible. — Ed.]

SAMUEL JONES *versus* DANIEL COOLIDGE.

In an action by an endorsee of a promissory note against one of two joint and several promisers, the other promiser was offered as a witness to prove usury, the defendant having released him; but he was not admitted.

ASSUMPSIT on a promissory note, dated June 24th, 1807, by which the defendant and one *Joel Wellington*, jointly and severally, promised *Levi Thaxter*, to pay him or his order 448 dollars in six months with interest, which was endorsed by *Thaxter* to the plaintiff.

At the trial, which was had upon the general issue before *Parsons*, C. J., at the sittings after the last October term, in this county, the signatures of the promisers and endorser being admitted, the note was read in evidence. The defence was usury, to prove which the defendant offered to swear *Joel Wellington*, the other promiser, he having released him. To this the plaintiff objected, on the ground that he was ignorant of the fraud, and that if a party to a fraudulent negotiable security could be a witness to defeat * it in the hands of an innocent purchaser, the tendency [* 200] would be, not to suppress, but to encourage fraud. The chief justice refused to permit *Wellington* to be sworn, in order to have the question settled; and a verdict being returned for the plaintiff, the defendant moved for a new trial, upon the judge's report.

Bigelow, for the defendant, argued that *Wellington* ought to have been admitted, since the plaintiff, by bringing his action against *Coolidge* alone, had chosen to consider the note a several one, and thus to put *Wellington* wholly out of the case.

Dana, for the plaintiff, cited the case of *Churchill vs. Suter*. (1) *Per Curiam*. Let judgment be entered on the verdict.

(1) 4 *Mass. Rep.* 156. — See also 3 *Mass. Rep.* 27, *Warren vs. Merry*.

DANIEL FREEMAN *versus* TIMOTHY DAVIS AND OTHERS

Where a prisoner in execution for debt, having given bond for the liberty of the yard, was in the night-time in a room upon the ground floor of a house owned by the county, within the limits of the yard, and kept by the jailer, the chambers only of which above the rooms on the ground floor had been used by debtors having the liberty of the yard, he was held to have committed an escape.

A bond for the liberty of the yard, the penalty of which was less than double the sum for which the prisoner was committed, was not held to be therefore void ; but to be subject to the equitable powers of the Court, who rendered judgment upon it for the amount for which the prisoner was committed, with interest and costs.

THIS was an action of debt on a bond executed by the defendants, and dated Sept. 29th, 1808. *Davis*, being a prisoner for debt, duly committed to the jail in *Concord*, in this county, at the suit of the plaintiff, executed the bond, with the other defendants as his sureties, to obtain the liberty of the yard ; the condition of the bond being conformable to the statute of 1784, c. 41.

The defendants pleaded that *Davis* continued a true prisoner, without committing any escape ; on which issue was joined. This issue was tried before the *chief justice*, at the sittings here, after the last October term, and a verdict found thereon for the plaintiff, subject to the opinion of the Court upon the chief justice's report.

[* 201] *The facts given in evidence or admitted at the trial were, that the said jail had been duly recognized by the Court of Sessions, as a public county jail ; that the county were also the proprietors in fee simple of a dwelling-house near the jail, the whole of which house was within the limits of the yard belonging to the jail ; that the said house was a licensed tavern, kept by the jail-keeper, and that the chambers above the ground floor of the said house have, ever since the recognition aforesaid, been used for lodging-rooms by debtors in execution entitled to the liberty of the yard ; but that the defendant, since the execution of the said bond, and before the commencement of this action, had frequently, in the night-time, been in the bar-room of the said tavern on the ground floor thereof, amusing himself with the company that was there ; and there was no evidence that the said bar-room had been used by debtors having the liberty of the yard, as an apartment belonging to the said jail, for a chamber or lodging-room. Upon these facts the *chief justice* directed the jury, that in law the plaintiff had maintained his issue. For this direction the defendants moved for a new trial.

The judge added to his report, that if a new trial should not be

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granted, two other questions were also reserved. One was, whether the bond was not void, the penalty not being double the amount for which the defendant *Davis* was imprisoned on the execution; the penalty being 62 dollars 84 cents only; and the judgment on which the execution in this case was sued out being for 40 dollars 60 cents damage, and 6 dollars 50 cents costs. The other question was whether, if the bond were not void, judgment in this action ought to be rendered for the penalty, or only for the sum due on the execution.

Stearns for the plaintiff.

Lawrence for the defendants.

The Court decided that the facts clearly showed an escape, that the bond was good by the common law, although not conformed to the statute, and that it was subject to the *equitable powers of the Court. The penalty being [* 202] declared forfeited, the defendants prayed for a hearing in equity, and judgment was finally entered for the amount of the judgment on which the execution had issued, with interest from the date of the judgment and costs.

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ABRAHAM BIGELOW *versus* THE CAMBRIDGE AND CONCORD
TURNPIKE CORPORATION.

Where a statute gives a right to recover damages, reduced pursuant to the provisions of such statute, to a sum certain, an action of debt lies, if no other specific remedy is provided.

THIS was an action of *debt*, in which the plaintiff declared on a judgment of the Court of General Sessions of the Peace for this county, rendered February, 1806, for the sum of 1348 dollars damages, in his favor, and against the said corporation.

The record upon which the action was founded, recites a petition presented to the Sessions in behalf of the corporation, grounded on an act of the legislature giving liberty to the corporation to extend their road, and providing that where the lands, over which the said road is located cannot be obtained by agreement, a committee may be appointed on application to the Sessions to estimate the damages, &c. The record then states the appointment of a committee, and their report estimating the damages to be paid by the corporation to sundry persons named, and amongst others, the sum of 1348

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dollars to the plaintiff. "All which being seen and understood by the Court, is accepted. And the Court award that the before-named creditors may severally have a warrant of distress for the sums to them above respectively awarded, unless the proprietors of said turnpike pay the same within thirty days from this 26th day of February, 1806."

The action was submitted to the decision of the Court, upon the record, together with the following facts, *viz.* 1. That the plaintiff, within a year from the acceptance of the report, demanded [* 203] payment of the sum awarded him of * the treasurer of the corporation, who refused to pay the same, and said there was no money or property in his hands or within his knowledge, out of which the plaintiff's demand could be satisfied. 2. That within a year from the said acceptance there was no property of the corporation, which could be distrained by the plaintiff for his said damages. 3. That the defendants hold a bond made by sundry persons to indemnify the corporation, among other things, against the damages so awarded to the plaintiff. 4. That no part of the said damages has ever been paid to the plaintiff. 5. That the defendants have not completed the said road within three years, according to the requisitions of the act mentioned in the record of the Sessions; but that the road has been made over the lands of the plaintiff, and has been in use from the year 1805 to this time, and is now in use.

If, upon these facts, and the inspection of the record of the Sessions, the Court should be of opinion that an action of debt could be maintained, the parties agreed that judgment should be entered for the plaintiff for the sum demanded, with the interest thereof from the 20th of February, 1806. Otherwise the plaintiff was to become nonsuit.

Ward and Heald, for the defendants, cited the act incorporating the proprietors of the turnpike, (*Stat.* 1802, c. 124,) also the additional act, (*Stat.* 1804, c. 77,) and they contended that by the second section of the latter act, the Court of Sessions was to cause the damages to be estimated, to order payment to be made in a reasonable time, and to issue warrants of distress, if necessary, as in the case of public highways, and that this was the plaintiff's only remedy. The case of *Gedney vs. The Inhabitants of Tewksbury* (1) was cited and relied on, as a decisive authority, that debt does not lie in this case.

Stearns and Baldwin, for the plaintiff, insisted that the Sessions could only liquidate the damages, but had no power to en-

(1) 3 *Mass. Rep.* 307.

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force the payment of them. The order of payment * was [* 204] a nullity, and no warrant of distress could issue. The words in the section relied on for the defendants, "according to the law which provides for the recovery of damages arising from the laying out of highways," are merely descriptive of the statute referred to, and only relate to the ascertaining of the damages.

In the case cited for the defendants, the Court went upon general grounds, which do not exist in this — that the statute gave an adequate remedy; that the property was taken for public use; that a town ought to have reasonable time to raise and collect money, which requires a meeting, a vote, and a tax to be assessed and collected.

In this case there is no such remedy, as there is against towns. If the Sessions could issue a warrant of distress, it would be of no avail, because there is no corporate property on which it could be levied. But a *feri facias* upon a common law judgment may perhaps be satisfied by a sale of the franchise; † or if the corporation resist payment, it may lay the foundation for a *quo warranto*.

It was objected in *Gedney vs. Tewksbury*, that where a statute gave a specific remedy, it must be pursued. But it was admitted in that case, that if the statute only ascertained the right, as in this case, but furnished no remedy, the common law would supply it.

By the Court. Whenever a statute gives a right to recover damages, reduced, pursuant to the provisions of such statute, to a sum certain, an action of debt lies, if no other specific remedy is provided.

Let judgment be entered for the plaintiff for the amount agreed by the parties.

† Since the argument and decision of this action, the legislature has enacted, by Stat. 1810, c. 131, that the franchise of any turnpike, or other company, incorporated by law, with power to receive toll, may be attached on mesne process, and sold on execution, to satisfy any judgment recovered against such company. [And see *Revised Statutes*, ch. 44, sec. 11. — Ed.]

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* WILLIAM AUSTIN versus JOSEPH WILSON AND OTHERS.

Practice. — The Court will not hear a cause referred to them upon an agreed statement of facts, by which only a preliminary question will be settled, leaving the merits undecided.

THIS was an action of covenant against the defendants, as heirs of the covenantors in a certain conveyance of land.

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The parties had agreed to certain facts, which were submitted for the opinion of the Court; and in case that opinion should be, that the defendants were all liable, as heirs of the original grantors, the defendants agreed to try the cause upon the plea, that they have nothing by descent from their respective ancestors, or to be defaulted; and if they should be defaulted, referees were to be appointed to ascertain the damages, &c.

But the Court refused to hear the cause upon the facts stated, observing that the submission was merely of a preliminary question; and that after that question was decided, there might still be an issue to the merits to be tried.

JOHN G. BOND *versus* ABEL CUTLER.

A want of recollection of a fact, which, by due attention, might have been remembered, is not a ground for granting a new trial.

THIS action was *assumpsit* on a promissory note, sued by *Bond* as the endorsee, against *Cutler* as the maker.

At the sittings after the last October term in this county, it was tried by review before the *chief justice*, and a verdict found for *Bond*; having been tried at a preceding term on the general issue, and a verdict having been returned for the defendant, *Cutler*. — At the last October term, after the *chief justice* had left the Court, and *Parker, J.*, was on the bench, for the purpose of disposing of one or two causes, in which the *chief justice* had been counsel while at the bar, the counsel for *Cutler* filed a petition for a new trial, alleging certain grounds therefor, which will appear in the opinion of the Court, as recited below.

Bond's counsel, then in Court, agreed to take notice [* 206] of the petition; and as judgment had then been entered on the verdict, and an execution had been sued out on *Cutler's* giving security to satisfy the judgment, if it should not be vacated and a new trial granted; the judge ordered the execution to be superseded, and no other execution to issue until the further order of the Court; and also ordered the petition to stand over for the decision of a full Court.

The petition was briefly spoken to by *Ward* and *Bigelow* for the petitioner, and *Dana, contra*.

PARSONS, C. J. A new trial is prayed for on three grounds —

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that the jury found their verdict against the weight of evidence; that they were misdirected by the judge in a matter of law; and that, since the trial, other material evidence has come to the knowledge of the defendant.

What was the evidence to the jury, or the direction of the judge in the matter of law, appears only from the allegations in the petition. But they ought to appear, either by exceptions allowed by the judge, or by his report, unless the judge should unreasonably refuse to allow exceptions, or make a report. In the present case, no exceptions were tendered to the judge, and no application was made for any report. We do not therefore inquire into the existence of the two first grounds on which a new trial is prayed for.

The third ground is, that since the last trial the defendant has come to the knowledge of a material fact.

This is thus explained:—The note was supposed at the trial to be declared on as dated Sept. 24, 1801. The defendant insisted that the date was the 4th of the same September, but the jury considered it as a note dated the 24th of September. Now, the petitioner says, that it has come to his knowledge, that, on the last-mentioned day, he was absent in a remote part of the District of *Maine*, and so could not have made the note on that day.

The defendant cannot prevail on this ground; for he knew where he was on the 24th of September, 1801, as well

*before the trial as after; and a want of recollection of [* 207] a fact, which, by due attention, might have been remembered, cannot be a reasonable ground for granting a new trial. For a want of recollection may always be pretended, and may be hard to be disproved.

In examining the record relating to this last ground, a fact has come to the knowledge of the Court, by which it is manifest that the last trial was a mistrial. On that trial, it was the understanding of both the parties, that the plaintiff's declaration was upon a note dated September 24, 1801, and the jury were therefore directed, if the note produced was dated the 4th of September, that the issue was with the defendant, the dispute about the date of the note arising from the appearance of the note on the face of it. On examining the record, it appeared that the plaintiff had declared on a note, as dated the 4th of September, 1801, but the record of the judgment of the Common Pleas had in this Court been altered, so that the date appeared in that record to be the 24th of September, 1801. But the writ of review, which was the foundation of the second trial, was right, describing the note as dated the 4th of September. Upon inquiry, there appears to have been in the plaintiff's attorney no designed malpractice. He supposed that he had leave to amend;

and on that supposition, instead of filing a new count, or having a special entry of the amendment ordered, he very irregularly altered the copy of the Common Pleas' judgment; but made no alteration in the writ and declaration. There does not appear to have been any leave to amend granted, and therefore the alteration is nugatory. But as the plaintiff might have had leave to amend by filing a new declaration upon the usual terms, we are not disposed to believe that the attorney acted criminally; but he certainly acted with imprudence, for which his client must necessarily suffer.

Upon ordering another trial, as it is on review, we cannot direct an amendment without consent. But as the justice [* 208] of the case seems to require an amendment, in order to relieve the defendant against a mistrial, and to put the cause in such a form that the merits of it may be tried, we have concluded to order — that if the defendant's counsel will sign and file a consent, that upon the retrial of this cause, the writ, declaration and record shall be considered and taken to be so amended, as that the note declared on shall bear date the 24th of September, 1801, then the judgment entered at the last October term shall be vacated, the action shall be brought forward to this term, when, because of the mistrial, the verdict shall be set aside, and a new trial be granted

JAMES BROWN *versus* THOMAS WALLACE.

An execution delivered to the sheriff who served the original writ, and a return of *non est inventus* by him, is sufficient to maintain a *scire facias* against the bail, although the principal live in another county.

THIS was a *scire facias* against *Wallace*, as bail of one *Hubbard*, who is named in the proceedings as of *Belfast*, in the county of *Hancock*. *Hubbard* was arrested by the sheriff of *Suffolk*. The execution in the original action was directed to the sheriffs of *Suffolk* and *Hancock*, and to the coroners of *Suffolk*, there being at that time no sheriff in the county of *Suffolk*. *Benjamin Homans*, a coroner of *Suffolk*, returned it with *non est inventus*.

The defendant demurred to the *scire facias*, and the plaintiff joined in demurrer.

Dana, for the defendant, objected that the execution was not put into the hands of the sheriff of *Hancock*, in which county *Hubbard* has his home.

But it was answered by *the Court*, that it had been long a settled practice to deliver the execution to the same officer who took the bail. His return is sufficient. — So the *scire facias* was adjudged good and sufficient.

Fay for the plaintiff.

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* JAMES PRESCOTT *versus* ELIAKIM TUFTS.

Where a writ bears test of a justice of the Common Pleas, who is plaintiff in the suit, it must be pleaded in abatement, if the defendant would avail himself of it.

DANA, of counsel for the defendant, moved in arrest of judgment :
1. Because the original writ bears test in the name of the plaintiff, who was *chief justice* of the Court of Common Pleas, whereas it ought to have borne test in name of the senior justice, who was not a party. 2. Because the plaintiff was one of the justices, before and by whom the said Court of Common Pleas was holden.

In support of his motion, *Dana* referred to the case of *The Mayor of Hertford*, remembered by Lord *Holt*,⁽¹⁾ who sat as judge in his own cause, for which he was brought up to the King's Bench by attachment, and laid by the heels ; though, as it is said in one of the books, he got off the easier for that he had been an old cavalier.

Bigelow, for the plaintiff, observed that the case referred to was of a judge of an inferior and limited jurisdiction, and the fact might be made to appear in any way ; but the Common Pleas was a court of general jurisdiction, respecting which very different rules were to be applied. It does not appear from the record that *James Prescott*, the plaintiff in this action, and *James Prescott*, the chief justice of the Court of Common Pleas, are the same person. If this were the fact, the defendant, to avail himself of it, should have pleaded it in abatement. And of this opinion were *the Court*. So the defendant took nothing by his motion.

(1) 1 *Salk* 201. — 7 *Mod.* 1.

WILLIAM BRIDGE *versus* JOHN FORD, JUN.

In an action of debt on a recognizance taken by a justice of the peace, conditioned to prosecute an appeal from his judgment to the Common Pleas, it must be alleged that the recognizance was returned to, and made a record of that court.

In this action of *debt* upon a recognizance entered into before a justice of the peace, and of which a partial report was made, (vol. 4, page 641,) the plaintiff had leave, by consent, to amend by filing any new counts, the defendant waiving his demurrer.[†]

[* 210] * The plaintiff accordingly filed three new counts. In the first he recites, that, pursuant to a law of the commonwealth, passed March 4, 1790, entitled "An act to regulate the catching of salmon, shad, and alewives, and to prevent obstructions in *Merrimack* river, and in other rivers and streams running into the same, within this commonwealth, and for repealing several acts heretofore made for that purpose;" one *James Bowers*, a minor, upon the complaint of the now plaintiff, and by force of a warrant, issued by *James Abbot*, Esq., a justice of the peace for said county, was on, &c., brought before the said justice to answer to said complaint, and after due examination, &c., it was adjudged by the said justice that the said *Bowers* should pay a fine of 13 dollars 33 cents, to be disposed of as the law directs, with costs, &c.; from which judgment the said *Bowers* appealed to the next Court of Common Pleas, &c., and the defendant entered into a recognizance to the plaintiff, &c., with condition that *Bowers* should prosecute his said appeal with effect, &c., "*as by said recognizance here in Court to be produced more fully appears.*" The plaintiff then avers, that *Bowers* did not prosecute, &c., and that the defendant at the same Court, although solemnly called, did not appear; and that an action has accrued to the plaintiff, &c.

The second count contains the same recitals and averments as the preceding one; except that after reciting the recognizance, it adds, "*As by the record of said recognizance with the said justice remaining more fully appears, a copy whereof, certified by said justice, the said Bridge brings here into Court.*"

The third count declares generally upon the recognizance, "a

[†] In the report of the decision referred to, the demurrer is stated to have been special, and the causes of demurrer are recited. I have since learned that the causes of demurrer were withdrawn before the argument. The new counts, and the demurrer to them, were also filed before the opinion of the court was delivered at *Boston* and the parties expected to be further heard; but this was not known to the court at the time of the decision, which, of course, was upon the former counts.

copy of which recognizance, certified by the said justice, the said Bridge brings here into Court of the tenor following," viz. and recites it in hæc verba, with the condition; adding an averment that Bowers did not prosecute his appeal, and that the defendant also made default.

To these new counts the defendant still demurs, and assigns several causes of demurrer; amongst which are these, *viz. "That it does not appear that the recognizance [* 211] was ever transmitted by the said justice to the Court appealed to, and there entered of record, as it ought to have been," and "that the said recognizance is not declared on as a record of the Court of Common Pleas, to which *nul tiel record* might be pleaded; but as a record of the said justice, to which the plea would be immaterial."

Locke for the plaintiff.

Stearns for the defendant.

Curia. The recognizance should have been returned to the Court of Common Pleas, to which court the appeal was made, and there filed as a record of that court, upon which the action should have been brought. The plaintiff has not declared, in either of his counts, as upon a record of the Common Pleas, and for this the declaration must be adjudged bad.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF ESSEX, NOVEMBER TERM, 1810,

AT SALEM.

PRESENT:

HON. THEOPHILUS PARSONS,	CHIEF JUSTICE.
HON. THEODORE SEDGWICK,	} JUSTICES.
HON. SAMUEL SEWALL,	
HON. ISAAC PARKER,	

ELIZABETH MACE *versus* JOSEPH MACE

Where the respondent, in a libel for a divorce, is merely absent on a voyage, with an expectation of returning, the Court will not proceed upon a notice in a newspaper.

THE libel in this case, which was for a divorce *a vinculo*, containing a suggestion, that the respondent was absent from the commonwealth, notice was ordered at the last term to be given by a publication of the libel, and order of notice in a newspaper.

Upon the hearing it appeared that the respondent was an inhabitant of *Newburyport*, in this county, and a seaman by profession; and that he was now absent on a voyage from which he was expected to return in the due course of the voyage.

The Court observed that this was not a proper proceeding. Such an absence was not sufficient to justify proceedings upon the libel, without personal notice, and the cause was continued for that purpose.

* EDWARD ST. LOE LIVERMORE, Assignee of EDMUND BARTLET, a Bankrupt, *versus* JOSEPH SWASEY.

In an action, by the assignee of a bankrupt, to recover property formerly belonging to the bankrupt, the judgment of the District Court, founded upon the verdict of a jury, that the party had committed an act of bankruptcy pursuant to the 52d section of the bankrupt law, is final upon the question, as to all the creditors, as well those who shall have come in under the commission as others.

THIS was a writ of entry, brought to recover possession of a parcel of land heretofore the property of *Bartlet*, the bankrupt. The action was submitted to the determination of the Court upon the following facts agreed by the parties.

The said *Bartlet* was seised in fee of the premises demanded in the original writ, on the 21st day of September, 1802, and remained so seised, from that time, until he was divested of it in manner hereinafter stated.

He was at that time, and long before, a merchant, residing at *Newburyport*; and on the 24th day of said September a commission of bankruptcy was issued in due form of law against him, on the petition of *George Jenkins*, to whom the said *Bartlet* was then indebted, in the sum of 1000 dollars and upwards. He was afterwards declared a bankrupt, by the commissioners named in the commission, and the plaintiff was chosen assignee of his estate and effects.

In June, 1802, the defendant recovered a judgment against the said *Bartlet* for the sum of 932 dollars 97 cents, and on the 10th day of July following, sued out his execution thereon, and on the 25th day of September aforesaid, caused the same to be levied on the demanded premises, as part of the estate of said *Bartlet*, and the same was accordingly on that day duly levied thereon.

On or about the 5th day of July, 1802, *Bartlet*, being unable to pay all his debts, called certain meetings of his creditors, in order to propose to them certain terms of compromise.

This attempt was continued, from time to time, until about the 21st day of September aforesaid, when the *Newburyport Marine Insurance Company*, having an execution against *Bartlet*, began to levy the same on certain of his goods and chattels, which were afterwards sold on the execution, and the said compromise was no further attempted.

* On the said 5th day of July, the said *Bartlet*, being [* 214] uncertain whether the said compromise would be effected, had determined to cause himself to be declared a bankrupt, and for

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that purpose agreed with one *Oliver Osgood*, to whom he was then indebted, that *Osgood* should purchase a writ of attachment for his said debt, and have it so served or conducted as to constitute an act of bankruptcy in said *Bartlet*. *Osgood* accordingly delivered his writ to *Philip Bagley*, a deputy sheriff, to be served or conducted according to the agreement aforesaid, and with directions to serve the writ when *Bartlet* should request it.

Afterwards, on the evening of the said 21st day of September, when the said *Bartlet* perceived that the said compromise could not be effected, and that his goods had been taken on said execution, and that the defendant's said execution was delivered to the said *Bagley*, to be served as aforesaid, in order to defeat or prevent the serving of the said two executions, he applied to the said *Bagley*; and it was agreed between them that *Bartlet* should be at his dwelling-house at ten o'clock that evening, and should close and fasten his doors, that *Bagley* should call at that time with said writ, and should be refused admittance. *Bagley* accordingly went at the time with the writ, and knocked at the door, when *Bartlet* looked out from his window, and told him he should not enter the house, which he did not attempt, nor did he examine to see whether any other door of the house was open, it being understood between *Bartlet* and *Bagley*, that this was done for the purpose of making *Bartlet* a bankrupt.

It was found by the verdict of a jury, to whom the question was submitted, that for some time previous to the said 21st day of September, the said *Jenkins* knew of the said *Bartlet's* intention to commit an act of bankruptcy, and that he applied for the said commission on the 22d day of said September, with *Bartlet's* knowledge.

In October, 1802, the said *Newburyport Marine Insurance Company*, who were creditors of *Bartlet*, but had not [* 215] * come in under the commission, applied by petition to the district judge for the district of *Massachusetts*, averring that the said *Bartlet* had not committed an act of bankruptcy, and praying an inquiry therein by a jury; and it was thereupon adjudged in the District Court aforesaid, that the said *Bartlet* had committed an act of bankruptcy.

If the Court should be of opinion, upon these facts, that the plaintiff was entitled to recover, the defendant agreed to be defaulted, and if otherwise, the plaintiff agreed to become nonsuit.

Jackson, for the defendant, observed that having caused his execution to be levied on the demanded premises, which were agreed to have been the property of *Bartlet*, this would give him a good title, unless the case shows such an act of bankruptcy in *Bartlet*.

and such proceedings in consequence, as will defeat the levy of the execution. And he contended, *first*, that no act of bankruptcy was committed; and *secondly*, that the commission was taken out by collusion with the bankrupt, and for his benefit and convenience.

As to the first point, the act relied on was keeping his house, so that he could not be taken or served with process. The first objection to this act of bankruptcy is, that it was wholly arranged and conducted by concert and agreement between *Osgood* and *Bartlet*. It is hardly possible to imagine a stronger case of concert and collusion. Without recurring to authorities, it is very clear that a case like this could not be within the intention of the legislature. They evidently contemplate a creditor seeking to arrest his debtor, or to serve him with some process for the recovery of a debt; and being unjustly delayed by the debtor's keeping his house with intent to prevent the service. But nothing of this appears in the present case.

It is said by the Court, in the case of *Livermore, Assignee, vs. Bagley*, (1) that the legislature of the *United States* undoubtedly had a view to the *English* statutes and decisions on the subject of bankruptcy. The act of bankruptcy *in the [*216] *English* system, most analogous to that now in question, is described in the statute of 13 *Eliz. c. 7*.—"If any merchant, &c begins to keep house, to the intent or purpose to defraud or hinder any of his creditors," &c. It is perfectly settled in that country that the keeping house, in pursuance of a previous agreement with the creditor who calls for payment, is not an act of bankruptcy. (2)

But if the ground of this objection fail, and such an act of bankruptcy would be considered valid and effectual against strangers, notwithstanding the previous concert and collusion with the creditor, let this case be tested by the principles applicable to a *bond fide* act.

The mere fact of keeping house does not of itself constitute an act of bankruptcy; it is but *prima facie* evidence of it, and may be explained by circumstances, as sickness, the lateness of the hour, &c. (3) It is not, then, an act of bankruptcy to lock his doors against a sheriff at ten o'clock at night. Such a question is not

(1) 3 *Mass. Rep.* 511.

(2) *Field vs Bellamy*, *Bul. N. P.* 39.—*Bramley vs. Munde*, *Ibid.*—*Hooper vs Smith*, 1 *W. Black.* 441.—*Allan vs. Hartley*, *Cooke's B. L.* 5.—*Cawley & Al. vs Hopkins*, *Ibid.* 81.—*Stewart & Al. vs. Richman*, 1 *Esp. Rep.* 108.—*Roberts vs. Tisdale*, *Peake's N. P. Rep.* 27.

(3) *Cook. B. L.* 74, 100.

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affected by the solvency or insolvency of the party. If it was an act of bankruptcy in *Bartlet*, it would have been so in the wealthiest merchant in the country. It ought at least to appear, in such a case, that the party had continued to keep house for some time before or after; otherwise the Court will presume that he kept his house at so late an hour, with intent to retire to rest, and not to defraud his creditors. (4)

This was not a *bonâ fide* act; for *Bartlet* did not intend to delay or defraud *Osgood*. The whole transaction had been agreed on and was rather intended to promote and favor his views. But the intent is as essential as the fact of delaying a creditor. (5)

But, further, such an intent alone is not sufficient, unless an attempt be made to serve the party with process, or a creditor be in fact delayed; (6) neither of which appears in the present case.

[* 217] *If a valid and effectual act of bankruptcy has been shown, yet if the commission was taken out by collusion and concert with the bankrupt, to defeat an execution, or prejudice another creditor, it is void and ineffectual as against such creditor. In the present case, it clearly appears that the commission was taken out, by concert with *Bartlet*, by *Jenkins*, who was his brother-in-law, with intent to defeat the defendant's execution, and that of the *Newburyport Marine Insurance Company*. The case *ex parte Salkeld* (7) is much stronger than the present, in all its circumstances. In *Menham vs. Edmonson*, (8) the same principle is recognized. In this last case, the act of bankruptcy was not questioned; the only inquiry was, whether the commission had been taken out by concert with the bankrupt, in order to defeat the execution. If so, it was not doubted that it would be wholly ineffectual, as against the judgment creditor.

The judgment in the District Court, on the petition of the *Newburyport Insurance Company*, cannot have any effect in this case; for the present defendant is neither party nor privy to the judgment. The same judgment was introduced in the case of *Livermore vs. Bagley*, and was not there considered by the Court as having any operation. Indeed, the present defendant might as well contend that the verdict and judgment in *Bagley's* case shall now be conclusive in his favor.

An act of bankruptcy, and a commission under it, may be valid and effectual against one creditor, and not against another. The

(4) *Ex parte Hall*, 1 Atk. 201.

(5) *Fowler vs. Padget*, 7 D. & E. 509.

(6) *Garret & Al. vs. Moule*, 5 D. & E. 575.—*Barnard vs. Vaughan & Al.*, 8 D. & E. 149.

(7) 1 P. Will. 563.

(8) 1 Bos & Pul. 369.

books are full of such cases, and most of those before referred to are authorities to this point. (9) Suppose that, instead of the insurance company, *Osgood* or *Jenkins* had made such a petition to the district judge, and had alleged the concert and collusion as an objection to the act of bankruptcy. They would have been answered, that although this rendered the proceedings ineffectual, as against other creditors, yet that they, who were parties to the agreement, should not be permitted to allege the fraud. (10)

*Of course, judgment would have been rendered in sup- [* 218] port of the commission. Yet it could never be said to bind those other creditors, who, by the very terms of the proposition, are exempted from the operation of the rule. But if the judgment is conclusive in the case at bar, it must be so *proprio vigore*, from the mere fact that such a judgment was rendered without reference to the evidence, or any circumstances of that case; and if so, then a like judgment, rendered on a petition by *Osgood*, would be equally conclusive.

The judgment referred to was founded on a petition made in pursuance of the fifty-second section of the statute, and by a creditor who had not proved his debt under the commission. It might be very well objected to such a petition, that an act of bankruptcy and commission, although defective in some particulars, were valid as against the bankrupt, if he did not resist them, and also against all creditors who voluntarily came in under the commission. And if they were not valid as against the petitioner, he might defend himself against the assignees, in any action, in which his interest should be involved. Whereas, if he succeeded in his petition, he would set aside a commission, which was satisfactory to all who were parties to it, and which the law declares to be valid and effectual as to all such parties, thus prejudicing others without benefiting himself.

It is true that the act provides that such a judgment shall be final; but it does not declare it conclusive on third persons, or on all persons. The expression must refer only to the parties in that suit, and to the tribunal from which the appeal is made. In the fifty-sixth section, where the intention is to produce such an effect, the provision is, that in actions brought against debtors of the bankrupt, the commission, &c. shall be "*conclusive evidence*" of certain facts; and such or much stronger language would have been used in the fifty-second section, if it had been the intention of the legislature to make such a judgment conclusive on *all [* 219] the world. To give such a construction would be to

(9) *Barnford vs. Baron & Al.*, 2 D. & E. 594, in notis.

(10) *Bu. N. P. U*
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violate one of the soundest principles of justice, which is adopted by the common law; that no man's rights shall be affected by proceedings between other persons, with whom he has no concern, and over whom he has no control.

Livermore contended, that here was a sufficient act of bankruptcy within the statute, by *Bartlet's* "keeping his house, so that he could not be taken, nor served with process," when the officer went with the writ. As to the unreasonableness of the hour, none but the bankrupt himself could object this. But, in fact, it was not an unusual hour for the service of process; nor was the bankrupt or his family in bed, but the door was shut for the very purpose of preventing the officer from executing the writ, and thus to delay his creditors.

If *Osgood* had taken out the commission of bankruptcy, the facts would have been within the cases of *Hooper vs. Smith*, and *Bamford vs. Baron & Al.*, which were cited by the defendant's counsel. But here the petitioning creditor was not privy to the concert, and this brings the case directly within that of *Tappenden vs. Burgess*. (11)

The defendant, having acquired his claim to the demanded premises, subsequent to the declaration of bankruptcy by the commissioners, has no right to contest the fact of an act of bankruptcy having been committed. That declaration must be considered as a judgment of a competent tribunal, as to all facts incumbent upon them to examine and decide upon. (See § 1 and 3 of the *U. S. Bankrupt law*.) It is true, that in the *English* cases, a question is often made, whether an act of bankruptcy was committed on a particular day; but the practice of requiring proof of the bankruptcy at the trial must have arisen from the assignee's attempting to prove an act some time prior to the commission, so as to overhaul a transaction of a bankrupt in favor of some creditor, or an execution executed.

Doubtless, commissions have frequently issued upon concerted acts of bankruptcy; and as such acts have been [* 220] *ruled to be sufficient to support the commission, as to all who chose to come in under it, if it had been conceived that the property assigned, under such a commission, could afterward be seized on execution, as the estate of the bankrupt, cases to this effect would be found in the books, of which, however, there are none. If the defendant's reasoning, respecting concerted acts of bankruptcy, is correct, the estate of the bankrupt, in whose hands soever it may be, is still liable to the demands of such cred

itors as may not come in, and may even be conveyed by the bank rupt ; because the act of bankruptcy does not conclude third persons, not privy to the agreement. Even a payment to the assignee would be no discharge to the debtor. Such a doctrine would upset most commissions.

But whether the fact can or cannot be contested in ordinary cases, it is not competent to the defendant in this instance to contest it ; it having been settled by the judgment of the District Court, pursuant to the provision in the fifty-second section of the statute. This section provides that *any creditor* of the bankrupt, being dissatisfied with the determination of the commissioners, relative to any *material fact* in the commencement or progress of the proceedings, may petition the judge, setting forth such facts, and the determination thereon, and pray for a trial by jury ; and judgment being entered on the verdict of the jury, shall be *final on the said facts*.

The facts in the present case are precisely within the provision. A creditor of the bankrupt, *viz.* the *Newburyport Insurance Company*, dissatisfied with the determination of the commissioners, relative to a material fact in the commencement of the proceedings, *viz.* their declaration that *Bartlet* had committed an act of bankruptcy, prior to the 24th day of September, 1802, petitioned the judge, traversing that fact ; upon which issue was joined, a verdict found affirming the declaration of the commissioners, upon which judgment was rendered by the Court.

The expression of the law is *any creditor* ; and it is absurd *to say that such creditor must prove his debt [* 221] under the commission, to give him the right of petitioning, when the fact he means to contest is the bankruptcy of the party.

But it is objected that the defendant was not a party to this judgment, and, therefore, is not bound by it. The answer is, that the judgment is like the decree of a Court of Admiralty, and in some instances of a Court of Chancery, and must, from the necessity of the case, conclude all parties. And all persons must be considered as party to the judgment, or the provision of the statute is worse than nugatory. Mischiefs of the most extreme kind would follow from a contrary construction.

Jackson, in reply. It is said that none but the supposed bankrupt can object, on account of the unreasonable hour, when the sheriff called with his writ. We say the objection may be made by any person interested. The question is, whether the trader, "with intent unlawfully to delay or defraud his creditors, kept his house," &c. Without such intent it is no act of bankruptcy

Though he should afterwards collusively consent to have it considered an act of bankruptcy, his subsequent assent cannot alter the nature of the act so as to affect third persons. For if it were so, it would depend on the will of *Bartlet*, after the commission was taken out, either to defeat it, and leave the defendant's execution to operate; or by waiving this objection, to render the commission valid, and defeat the execution.

It was further said by the plaintiff, that the petitioning creditor, not being privy to the collusion, the commission taken out by him is not affected by it; and for this the case of *Tappenden vs. Burgess* was cited. That case, taken in connection with *Bamford vs. Baron & Al.*, proves only that if a trader makes a conveyance, by deed, of all his effects to certain creditors, those creditors, who were parties to the transaction, shall not afterwards say it was a fraudulent conveyance, and so set it up as an act of bankruptcy.

But any creditor, not a party to the deed, may avail himself of the fraud, as an act of bankruptcy. There is no analogy between that case and the present one. The making of such a deed is *ipso facto* an act of bankruptcy; but certain persons are estopped from saying so, because they shall not allege their own fraud, and derive an advantage from their own wrong. In the present case, the keeping house is not in itself an act of bankruptcy; it wants the essential ingredient of the unlawful intention to defraud the creditor, and to prevent the service of the writ. As there is not, then, in fact, any act of bankruptcy, it is unimportant who petitions for the commission. The only apparent analogy between the two cases arises after the commission is taken out; then the bankrupt, if he submits to it, and all the creditors, who voluntarily come in, are estopped to say that the transaction, on which they relied to support the commission, was collusive and fraudulent. But a creditor, not a party to this collusion, and who has not assented to it by coming in under the commission, is not so estopped, and may accordingly prove the fraud, and avoid its operation on himself.

If the declaration of the bankruptcy by the commissioners had, in any degree, the nature, force, or effect of a judgment, the bankrupt himself, who is a party to the supposed judgment, could not contest the fact of the bankruptcy. Yet the books are full of cases, in which the party charged does resist the commission; and by actions of trover or trespass against the commissioners, the assignees, or their servants, disputes his having committed an act of bankruptcy; and this question is tried in the usual mode, in the common law courts, without any reference to the decision of the commissioners.

If the consequences apprehended by the plaintiff would follow from the principles advocated for the defendant, the argument from inconvenience would be very powerful ; though perhaps not stronger than in some analogous cases. Thus, where an administrator is appointed, and a will is afterwards found and proved, the executor shall avoid all acts of the administrator. (12) It was even formerly held *that payment of a debt to such ad- [* 223] ministrator was no discharge of the debtor. This last point has been since overruled ; (13) but while it was believed to be law, the hardship of the case did not prevent the court from enforcing it.

But the argument does not apply to the facts in this case. The defendant levied on the estate in question long before the assignment. He does not attempt to disturb any sales, receipts, or payments, made *bonâ fide* by the assignee, except so far as the defendant had, by a previous attachment, deprived the plaintiff of the possession of the thing, or given him notice of a claim, so that he might suspend any proceedings conflicting with it, until the right was determined.

The principle for which we contend is the same that was adopted by this Court in the case of *Taber's* insolvency. (14) That conveyance was good as to *Taber*, the insolvent person, and as to all the creditors who assented ; so is the assignment under this commission. The conveyance there was fraudulent and void, as against all the creditors who did not assent to it ; so, we contend, is the commission here. Though the Court in that case held the conveyance void, yet, in the suit against the assignees, as trustees of *Taber*, they were protected in every thing they had done pursuant to the assignment, before the commencement of *Barker's* suit, and were held answerable only for the balance in their hands. But in the replevin of the ship, included in the assignment to them, and attached before they obtained the possession, the Court decided against the assignees.

The action was continued *nisi* for advisement, and at the succeeding March term in *Suffolk*, the opinion of the Court, except *the chief justice*, who did not sit in the case, was delivered by

SEDGWICK, J. From the facts agreed between the parties it appears, that the land demanded was the property of *Edmund Bartlet* on the 25th of September, 1802 ; unless *it [* 224] had before that time been lost by an act of bankruptcy committed by him ; and that on that day an execution, which issued

(12) *Bac. Abr. Executors, &c.*, F. 13.

(14) 5 *Mass. Rep.* 144, *Widgery & Al. vs. Haskell.*

(13) 3 *D. & E.* 125.

on a regular judgment, previously obtained by the present defendant against *Bartlet*, was duly levied upon it; and that the requirements of the law have been pursued in the return and registry of the execution; so that he has obtained a good title to the land, provided it belonged to *Bartlet* at the time of the levy. And it did belong to him, unless he had previously committed an act of bankruptcy, by which it was transferred to the demandant, as his assignee.

One day previous to the levy of the execution, on the 24th of September, 1802, a commission of bankruptcy was taken out against *Bartlet*. He was afterwards duly declared a bankrupt, and the demandant was appointed his assignee. If there was a good foundation for the issuing of the commission, in consequence of a previous act of bankruptcy, then, at the latest, on the 24th of September, and before the land was seized by virtue of the execution, *Bartlet* was divested of his property in it, and at the same instant, by relation, it became transferred to, and vested in the demandant. If, then, there be *conclusive* evidence that the commission was duly issued, it follows, of course, that the demandant must recover; and he insists that this Court is bound to consider the judgment of the District Court as such *conclusive* evidence.

The judgment of the District Court is founded on the 52d section of the statute, by which it is enacted, "that it shall and may be lawful for *any* creditor of such bankrupt to attend all or any of the examinations of such bankrupt, and the allowance of the final certificate, if he shall think proper, and then and there to propose interrogatories, to be put by the judge or commissioners to the said bankrupt and others; and also to produce and examine witnesses and documents before such judge or commissioners, relative to the subject-matter before them. And in case either the

[* 225] bankrupt or creditor shall think him or herself *aggrieved by the determination of such judge or commissioners, relative to *any material fact, in the commencement or progress of the said proceedings*, or the allowance of the certificate aforesaid, it shall and may be lawful for either party to petition the said judge, setting forth such facts, and the determination thereon with the complaint of the party, and a prayer for trial by a jury to determine the same; and the said judge shall, in his discretion, make order thereon, and award a *venire facias* to the marshal of the district, returnable within fifteen days, before him, for the trial of the facts mentioned in the said petition, notice whereof shall be given to the commissioners and creditors concerned in the same; at which time the said trial shall be had, unless, on good cause shown, the judge shall give further time; and judgment being entered on the

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verdict of the jury, shall be final on the said facts; and the judge or commissioners shall proceed agreeably thereto."

After issuing the commission, it was the duty of the commissioners to meet and proceed in the discharge of their duty. The first question to be determined by them, and which lays the foundation of all their subsequent proceedings, or whether they shall proceed at all, is, whether the person, against whom the commission has issued, has committed an act of bankruptcy? At these meetings *every* creditor has a right to attend, "to propose interrogatories," and to take a part in every question, in which he is interested. As to the first question to be decided, whether an act of bankruptcy has been committed, the creditors may have different opinions of their interest, and some be in favor of, and others opposed to an affirmative declaration being made by the commissioners; and if any shall think himself "aggrieved" by it, a right of appeal, by a petition to the judge, is allowed him, and he is entitled to a trial by jury, to ascertain whether the determination was justly made or not. On such a verdict, and in conformity to it, it is the duty of the judge to enter up judgment, which * judgment, the act declares, shall be final [* 226] *on the facts put in issue*, and that the judge or commissioners shall proceed *agreeably thereto*.

In this case, the commissioners having declared that *Bartlet* had committed an act of bankruptcy, the *Newburyport Marine Insurance Company*, who, it is agreed, were his creditors, being dissatisfied with that determination, availed themselves of the provision of the statute above cited, by instituting an appeal to the District Court. The proper issue was formed and tried. The verdict of the jury was against the petitioners, and established the fact that *Bartlet* was a bankrupt at the time of issuing the commission; and of course validating the declaration of the commissioners in this regard. On this verdict a judgment has been rendered. At that trial, not only the company, who were plaintiffs, might avail themselves of all the facts in their power, to substantiate their allegations, but, it is presumable, might also receive every aid, which could be afforded by any other creditor. In such a case, the consequences, which the act declares, shall follow such a judgment, that it shall be *final* on the facts put in issue, and that "the judge or commissioners shall proceed accordingly," seem very reasonable.

By this *final* decision, it is then rendered certain, that as early at least as the 24th of September, one day previous to the time when the defendant's execution was levied, *Bartlet* had become a bankrupt. And it may be justly observed, that if the judgment of

the District Court be final to *any purpose* whatever, so as to validate future proceedings under the commission; if to *any purpose* *Bartlet* had become a bankrupt, so as to authorize an assignment of his estate to the demandant, then upon the known construction of the bankrupt laws, he was thereby stripped of all his property, and it became, *at the same moment*, by relation vested in the assignee. Whether the verdict of the jury in the District Court was founded upon the facts agreed upon in this [* 227] case between the parties, or upon any other, * we do not think it important to decide or conjecture; because we are perfectly satisfied that we cannot go behind the judgment of the Court founded upon that verdict.

And we do not think that the proceedings, provided for by the above-recited clause of the act, are confined to creditors, who, previous to preferring the petition, had come in and proved their debts under the commission; because the words *any creditors* include *all creditors*, as well those who have not, as those who have come in under the commission; and because creditors, *before* they come in under the commission, have as great an interest in many respects, and particularly in the question of the bankruptcy, as they who have come in. And besides, there seems to be but little propriety, even if it be competent for him to do it, for a creditor, who has come in under the commission, and made himself a party to the proceedings founded upon it, to deny afterwards that it properly issued.

The result of this opinion is, that the other facts, stated, and argued upon, are unimportant to a decision of this case; we being all of opinion, that on the 25th of September, the day on which the execution was levied, the demanded premises were not the property of *Bartlet*, but had previously become the property of the demandant.

A contrary decision, we think, would be attended with the most pernicious consequences. While, on the one hand, it would be the duty of the assignee to dispose of the bankrupt's effects, and to pay the proceeds of them in dividends to the creditors, who had come in under the commission; the estate might be taken by other creditors, who had not come in, and the object of the commission be wholly defeated.

It is true that there are cases, not now necessary to be specified, in which it is optional to certain descriptions of the creditors of a bankrupt, to prove their debts under a commission or not; and if they decline the bankruptcy, it is no bar to an action against the debtor. But, in all cases, where there is a valid as- [* 228] signment by the commissioners, it * vests absolutely in

the assignee, at the moment of the bankruptcy, all the effects of the bankrupt, on which there was not a previous lien.

In the case of *Bamford vs. Baron*, cited at the bar, it was determined that parties, *who were privies, and had assented to a fraudulent deed of assignment*, could not set it up as an act of bankruptcy. But this will not apply to the case under consideration, were we now to determine on the validity of the facts agreed in this case as an act of bankruptcy; inasmuch as neither the assignee, the demandant, nor the petitioning creditor, were parties, or in any manner privy to what is relied upon as a concerted act of bankruptcy. But, as has been already said, we cannot go behind the judgment, to consider those facts. In that case, there was nothing to assimilate it to this. There was no judgment of court founded upon a statute, by which certain facts were *finally* ascertained, and which facts were to regulate the future proceedings. And in the case of *Tappenden & Al., Assignees, vs. Burgess*, where the only question was upon the validity of the act of bankruptcy, and the right of the plaintiffs to insist upon it, the deed, which was the act of bankruptcy, was concerted with some of the creditors, and amongst others, three of the assignees, they being four in number, and the fourth being the petitioning creditor. It was held that it was no objection to an action, brought by them as assignees, for the recovery of part of the bankrupt's estate, that *some of them* had concurred in such fraudulent deed set up as an act of bankruptcy; for such estoppel applies not to the assignees, who are mere trustees for the creditors at large; *but only to a petitioning creditor, who originates the commission.*

But it is not our intention, as we deem it unnecessary, to determine further than that the judgment of the district court decides *conclusively*, that previously to issuing the commission, on the 24th of September, *Barilet* had committed an act of bankruptcy; that from that time, at the latest, by the assignment of the commissioners, the demandant *thereby became entitled [* 229] to the demanded premises; and, consequently, that the levying of the execution, by the defendant, on the 25th of that month, was a wrongful dispossession of the demandant, which entitles him to recover in this action.

Defendant defaulted.

DANIEL FRENCH *versus* JONATHAN JUDKINS.

An officer, having an execution against *A*, seized the goods of *B*, who was an inhabitant of *New Hampshire*. It was held, that *B* might maintain his action against the officer in another county than that of the officer.

THE plaintiff, calling himself of *Chester*, in the county of *Rockingham*, and state of *New Hampshire*, sued this action against the defendant, naming him of *Monmouth*, in the county of *Kennebeck*, declared against him in trespass for taking and carrying away one pair of oxen, the property of the plaintiff, and converting them to the defendant's use, at *Ipswich*, in this county.

The defendant pleads not guilty as to the force, &c. ; and as to the residue of the trespass, he pleads in bar, that he was a constable in the town of *Monmouth*, in the county of *Kennebeck*, duly chosen and sworn ; and that one *Moses Joy*, of *Winthrop*, in the same county, sued out of the Common Pleas for said county, a writ of execution in due form of law, against one *Gould French*, of said *Monmouth*, directed to the several sheriffs of the counties of *Kennebeck*, *Lincoln*, *Hancock*, and *Cumberland*, or either of their deputies, or the constable of the town of *Monmouth*, for 36 dollars 13 cents, which writ was delivered by the said *Joy* to the defendant, to be duly served and returned ; and afterwards, by virtue of the said writ, he took the said oxen, shown to him by the creditor as the property of the said *Gould French*, to satisfy the said execution, which he sold, after keeping and advertising them according to law, and applied the proceeds of the sale to satisfy the said execution, of which he made due return ; which is the residue, &c., and traverses his being guilty in any other place than in *Monmouth*, and in due execution of his said office, &c.

[* 230] *To this plea in bar the plaintiff demurs generally, and the defendant joins in demurrer.

Banister, of counsel for the defendant, being called on by the Court to support his plea in bar, said he should contend that, the defendant being sued for an act done in the course of his office, the action was local in its nature, and ought to have been brought in the county where he dwells, and where the transaction took place ; and to maintain this position, he referred to the cases of *Sands vs. Lane*, (1) and *Purset vs. Hutchings*. (2)

Story, for the plaintiff, cited the cases in the margin. (3)

(1) *Cro. Eliz.* 667.

(2) *Ibid.* 842.

(3) 4 *Mass. Rep.* 591, *Cleveland vs. Welch*. — 5 *Mass. Rep.* 94, *Briggs vs. Nantucket Bank* — 8 *Edw.* 3. 20. — 2 *Rol. Abr.* 598, pl. 3, 4. — *Hob.* 5, 76. — *Comp.* 165. *Mosby*

By the Court. The only question, since the bar is clearly insufficient, is whether the Court of Common Pleas for this county is ousted of its jurisdiction in this case. We are satisfied it is not. Had the action been by a party to the original suit, perhaps it would have been local. But of this we give no opinion. Here, however, a stranger to that suit complains of an injury. The action is, doubtless, transitory; for the plaintiff cannot be presumed to know whether the goods were taken under color of office or not.

Plca in bar adjudged bad.

SHUBALL LOVELL *versus* THE INHABITANTS OF THE PARISH OF BYFIELD.

When one would have his ministerial taxes paid over to his own teacher, he must notify the parish of his election, and his teacher must demand the money within a year after the taxes are assessed. Such teacher must be the teacher of an incorporated society.

ASSUMPSIT for money had and received to the use of the plaintiff.

At the trial, which was had upon the general issue, before *Sewall, J.*, at the last April term, the plaintiff's demand * was specified to be the amount of several assessments [* 231] for parish taxes, paid by certain inhabitants of the said parish, and by them requested and directed to be paid over to the plaintiff as their religious teacher, &c.

The evidence for the plaintiff was, that for more than twelve years last past he has been the religious teacher of a society of the denomination of Baptists, who assemble for public worship in a meeting-house built for their use more than twenty years since, in *Rowley*, adjoining the parish of *Byfield*; and that public worship has been supported and attended by the said society, separately from the other inhabitants of *Rowley*, for more than thirty years. The plaintiff was engaged in 1797 by the said society as their teacher or elder, in which capacity he has ever since continued, having a salary annually voted him for his services, his agreement with them having been every year renewed. The society have a book in which their doings are recorded, and it appeared therefrom

vs. Fabrigas. — 1 *Saund.* 254, *Craft vs. Boits.* — *Willes's Rep.* 431, *The Bailiffs, &c. of Litchfield vs. Slater.* — 7 *D. & E.* 583, *The Mayor, &c. of London vs. Cole.* — 2 *Saund.* 5, *Mallor vs. Walker* — Note 1, *Cro. Eliz.* 468, *Bowyer's Case.* — *Moor.* 410 8. *C.* — *Cro. Eliz.* 261, *Ford vs. Brooks*

that, pursuant to articles agreed upon in 1794 for the regulation of the society, they have every year since that time chosen a standing committee to manage their concerns, and with authority to certify respecting members, &c. The taxes demanded were those assessed in the years 1801 to 1807 inclusive. Those assessed previously to the year 1807 were demanded on the 20th of May, 1808; and those for 1807 were demanded on the 28th of February, 1809. The demands were in each case accompanied with certificates signed by the plaintiff as teacher, and by the committee of the society chosen as aforesaid, for the time being, purporting that the persons, whose taxes were demanded, belonged to the said society, and attended their stated meetings for religious worship; and the persons taxed at the same time requested that their taxes might be paid over to the plaintiff, as their religious teacher. There was also evidence that the said taxes had been paid to the parish collectors. On the 7th of March, 1809, the said parish, at a legal meeting, authorized their assessors to pay over all taxes demanded [* 232] * by members of the parish worshipping with the Baptist society in *Rowley*, if a decision at law had been made in favor of any unincorporated society.

Upon this evidence the judge directed a nonsuit, which was entered, subject to the opinion of the Court; the parties agreeing that, if the nonsuit should be set aside by the opinion of the Court that the action is maintained for any part of the sum demanded, the defendants should be defaulted, and the damages assessed by the Court.

Dane for the plaintiff.

Prescott for the defendants.

Curia. We determined, in the case of *Montague vs. The First Parish in Dedham*, (1) after full consideration, that persons taxed to the support of public worship in a parish, must, within a reasonable time after they have notice of the assessment, notify to the parish their election to have their ministerial taxes paid over to their own minister; and that such minister must in a reasonable time demand those taxes of the parish. Upon the considerations there stated, we also decided, as a general rule, that such notice and demand ought to be given and made within a year after the assessment is made.

The facts in the case before us are not conformable to the decision we have cited; and on this ground it appears to us, that the plaintiff has not maintained his action.

On another ground also the plaintiff must fail. In the case of *Barnet vs. The First Parish in Falmouth*, (2) we declared our

(1) 4 Mass. Rep. 269.

(2) 6 Mass. Rep. 401

opinion, "that the constitution has not authorized any teacher to recover, by action at law, any money assessed pursuant to the third article of the declaration of rights, but a public Protestant teacher of some *legally incorporated society*." The society, with which the plaintiff is connected as a religious teacher, is not incorporated; he is therefore not entitled, within the decision last mentioned, to recover the money he demands in this action. (a)

Plaintiff nonsuit.

(a) [Vide *Acts*, 1811, c. 6. — 1823, c. 106. — 1834, c. 183., and *Revised Statutes*, 20. — ED.]

[* 233]

* ABRAHAM ULEN *versus* BENJAMIN KITTREDGE.

Where one wrote his name in blank upon the back of a promissory note, as a guarantor of the payment, and authorized another to write a sufficient guaranty over the name, it was held to be a memorandum in writing signed by the party, within the meaning of the statute of frauds; and parole testimony was received to prove such authority.

THIS action was *assumpsit*, in which the plaintiff declared upon the guaranty of the defendant of two several promissory notes, made by *Eliphalet Butman*, for the sum of 100 dollars each, payable to the plaintiff or his order; which were set forth in two distinct counts, in each of which the plaintiff avers that, in consideration of his forbearing until his return from sea to sue the said *Butman*, the defendant *Kittredge* promised to guaranty the payment of the said note.

At the trial, which was had upon the general issue before *Scwall*, J., April term, 1809, the notes declared on were given in evidence, with the defendant's endorsements thereon of his own name in blank; and which, by the agreement of the parties, were to be considered as filled up according to the tenor of the plaintiff's declaration.

It appeared from the testimony of *Joseph Strout*, that the notes had been left in his care, during the plaintiff's absence at sea, with directions to collect the money due upon them, and that he, after many applications to *Butman*, notified him that the notes would be put in suit, unless paid, or the payment secured; that finally the defendant and the said *Butman* came together to the witness, when *Butman* offered the defendant as a surety; who being asked if he consented to become security for the money until *Ulen's* return, and being told by the witness, that if *Butman* did not then pay it, he.

the witness, should expect to call on the defendant, he answered that he would pay, if *Butman* did not, upon *Ulen's* return, and proceeded to endorse the notes in blank; and being requested by the witness to write something over the name, the defendant answered that his name was enough, and that if he wrote it full, it would not make it stronger.

It also appeared that *Butman* became insolvent, and absconded before the plaintiff's return, and that some time after the plaintiff's return, *Strout* demanded payment of *Butman's* brother. [* 234] who was reputed to be his agent, and afterwards * of the defendant. *Strout* testified that when he made the demand upon the defendant, the latter observed he had tried to secure himself, as soon as he knew of *Butman's* absconding, but could not.

The defendant's counsel objected to the admission of any parole testimony, which would operate to explain the intent of the parties in the endorsements by the defendant. This objection was overruled by the judge, and he directed the jury to find for the plaintiff; and their verdict was so taken, subject to the opinion of the Court upon the report of the judge of the afore-recited facts; it being agreed at the trial that the plaintiff might file any new counts upon the same facts.

The cause was briefly argued at the last November term in this county, by *Prescott* for the plaintiff, and *Story* for the defendant.

Story contended that this was a promise to pay the debt of another, within the statute of frauds, (1) and our statute being a copy of the *English* statute as to this point, *English* authorities upon their statute are applicable here.

In the case of *Wain & Al. vs. Warlters*, (2) it was held that no person could by the statute of frauds be charged upon any promise to pay the debt of another, unless the *agreement* on which the action is brought, or some note or memorandum thereof, be in writing; by which word *agreement* must be understood the *consideration* for the promise as well as the promise itself; and therefore, where one promised in writing to pay the debt of a third person, without stating on what consideration, it was holden that *parole* evidence of the consideration was inadmissible, &c. This doctrine was recognized in the case of *Egerton vs. Matthews & Al.*; (3) and both the cases are cited and their principles adopted in the case of *Sears vs. Brink* and *Brink*, (4) in the Supreme Court of *New York*. And indeed if this statute does not support the principle contended for, its provisions are nearly vacated.

(1) 1788, c. 16. (2) 5 *East's Rep.* 10. (3) 6 *East's Rep.* 307. (4) 3 *Johns. Rep.* 211.
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* *Prescott*, for the plaintiff, urged that this was a very [* 235] common mode of contracting, and if judgment cannot be had upon this undertaking of the defendant, the statute, instead of protecting persons against fraud, will itself be an engine of fraud in vacating *bonâ fide* engagements. Here the forbearance is a valid consideration, and, under the agreement at the trial, it is as if the consideration and the promise had been written over the defendant's name. *Strout* was the defendant's agent as to this point, and if he did not execute his authority duly, it is chargeable to his principal, who shall not now avail himself of it to avoid his honest engagement. (5)

The action stood continued for advisement to this term.

By the Court. The defendant objects, that this being a promise to pay the debt of another, is void by the statute of frauds, which requires in such a case a memorandum in writing, signed by the party to be charged. But we are of opinion that the defendant's signature upon the back of the note, with the authority given by him to the witness to write over the signature a sufficient guaranty, and such guaranty being accordingly written by the witness pursuant to the authority, may be considered as a memorandum signed by the party, within the intent of the statute, as fully as if it had been written in the defendant's presence immediately after the signature. And parole evidence was as well admissible to prove this authority, as it is in any case upon a promise in writing, to prove the hand-writing of the party making the promise; a parole authority in this case being in law sufficient. (a)

Judgment on the verdict.

(5) 3 *Mass. Rep.* 274, *Josselyn vs. Ames*. — *Doug.* 515, *Russell vs. Langstaff*.

(a) [The report of the evidence discloses no such authority, but, on the contrary, a refusal of the party to do more than sign his name. See *Brillew & Wilson vs. Webb*, 2 *B. & Cr.* 483. — *Jackson vs. Hudson*, 2 *Cump.* 447. — Note to *Hunt vs. Adams*, 5 *Mass.* 360, *a.* Ed. 1835. — Ed.]

[* 236]

* *JACOB LITTLE versus JOSHUA GREENLEAF AND OTHERS.*

One living in the town of *A*, and hiring a store in the town of *B*, in which he deposited a cargo of salt for sale, and also owning and fitting vessels in *B*, is liable to be taxed therefor in *B*. But for his business done there as an underwriter, and for his shares in banks, insurance companies, and other incorporated funds of that kind, he is taxable in the town of *A*.

Assessors are not liable to an action of trespass for overrating one who is liable to be taxed by them.

TRESPASS for false imprisonment.

The parties agreed to the following facts: The defendants were assessors for the town of *Newburyport*, duly chosen and sworn, for the year 1805. On the 18th of September in that year, they assessed a state, county and town tax on the inhabitants of *Newburyport*, and others liable, &c. The plaintiff, on the first day of May, 1805, was an inhabitant of the town of *Newbury*, in said county, and was then engaged in trade and merchandise in said *Newburyport*, so far as having, on the 19th of April preceding, with one *Joseph Patch*, hired of one *Joseph Marquand* two apartments of stores on the said *Marquand's* wharf in said *Newburyport*, at the rate of one dollar per week, which stores were solely and exclusively occupied by said *Little* and *Patch* from the said 19th of April until the 1st of November following; they having deposited therein a quantity of salt, being the cargo of the ship *Alfred*, which ship and cargo were owned, three fourths thereof by *Little*, and one fourth by *Patch*. The said ship lay at said wharf from the said 19th of April, to the 30th of May following, the said owners paying dockage for her. *Marquand* occasionally sold part of the said salt as agent for the said owners, the keys of the stores being left at his house for their convenience. Besides the plaintiff's part of the ship *Alfred* of 339 tons, he also owned the whole of another ship of 310 tons, and one half of a brig of 170 tons, and of her cargo of sugar and molasses. He regularly cleared and entered his said ships and their cargoes at the custom-house in *Newburyport*, and repaired, manned, and victualled them there for their respective voyages; and never hired or occupied any store, shop or wharf in the said town of *Newbury*, in the transaction of any of his business aforesaid. The value of his proportion of the said ships, and cargoes, and stock in trade, so by him employed and [* 237] used as aforesaid in said * *Newburyport*, on the same first day of May, was not less than the sum for which he was assessed and taxed in said *Newburyport* for the same year. The plaintiff was also owner of 1400 dollars of the stock of an insurance company in *Newburyport*, was a director of the company, and usually frequented their office. And besides his interest in the said stock, he was a large underwriter on private policies of insurance in *Newburyport*; and used also to get his own vessels and cargoes insured in that town.

The defendants, by public advertisement, notified the inhabitants and others liable to pay taxes in *Newburyport*, to bring in to them invoices of their taxable property; and afterwards assessed the plaintiff, for the goods, wares, and merchandises, and stock in trade, ships and vessels by him owned, used and employed in *Newburyport*

in manner aforesaid, and for his proportion of the said stores, by him and the said *Patch* so hired and occupied: they filed copies of the valuations and assessments by them made in their office: they made their warrant in due form of law, directed to one *Jonathan Kettell*, the collector of taxes for said *Newburyport*, legally chosen and sworn; who demanded of the plaintiff the taxes so assessed upon him, and afterwards the same taxes not being paid, nor any personal property shown to him whereon to levy the same, he arrested the plaintiff, and restrained him of his liberty until he paid the said taxes.

In the last valuation of estates, made in pursuance of an act passed March 6th, 1801, the town of *Newbury* was charged for 119 tons of shipping, and for 3000 dollars stock in trade, as the property of the plaintiff, then an inhabitant of *Newbury*, and for such other estate, personal and real, as he then owned in that town. And the said town of *Newburyport* was not charged, in said valuation, with any personal property whatever belonging to any inhabitant of *Newbury*.

In the year 1805, the plaintiff was assessed in *Newbury* for 325 tons of shipping, and for 6600 dollars stock in trade *and other personal property. And it was the intention [* 238] of the assessors of *Newbury* to assess him, for the same year, for all his personal estate.

If, upon the foregoing facts, the Court should be of opinion, that the plaintiff was entitled to recover in this action, the defendants were to be defaulted; otherwise the plaintiff was to become non-suit.

The cause was argued at the last November term in this county by *Dane* and *Livermore* for the plaintiff, and *Jackson* and *Banister* for the defendants.

The counsel for the defendants relied, for their justification, upon the general tax act for the year 1805; in which it is recited, that "there are many persons within this commonwealth engaged in trade, who negotiate much business, and hire shops, stores, and wharves, in towns, &c. other than where they dwell, and whose property and ability can be better known to the assessors of the several towns wherein such business is transacted, than to those of the town, &c. where they may dwell;" and it is therefore enacted, "that for such goods, wares, and merchandise, or other stock in trade, ships and vessels, as are sold, used or improved in the towns, &c. other than where the owners thereof may dwell, such owners shall be respectively taxed therefor in such town, &c., and not where they dwell or have their home; and they shall be respectively held to deliver, on oath or affirmation, if required, a list

of their whole taxable estate to the assessors of that town, &c where they may dwell on the said first day of May; distinguishing what part thereof is taxable elsewhere; and in default thereof they may be doomed by said assessors. Provided, however, that this clause shall in no case be so construed as to enable the assessors of any town, &c. to assess an inhabitant of any other town, &c. for any property charged thereon in the last valuation."

The *plaintiff's counsel* insisted, that it was incumbent on the defendants to show that his taxable property was increased [* 239] between the years 1801 and 1805. Without this * the proviso of the tax act, in effect, forbids the defendants to tax the plaintiff at all. As to the difference of tonnage, of which the plaintiff appears to have been possessed in those two years, no inference ought to be drawn from it, since it is well known that assessors seldom value objects of taxation at more than one third of its quantity or value; or, supposing it to have been increased, the addition might have been purchased with other parts of his personal property.

Further, it must appear that the party, to be liable to be taxed, must transact his business in some shop or store, or on some wharf. In the present case, the plaintiff hired a part of a store merely as a place of deposit for his merchandise, but he did no business there. Nor does it appear that more than one of his vessels was at *Newburyport* during the year.

This new provision of the tax act must be construed strictly, or much confusion will follow. Personal property is naturally and regularly to be taxed with its owner, as cattle are taxed where owned, although they may be depastured in another town. Though the case may not find any store, shop, or wharf in *Newbury*, where the plaintiff transacted his mercantile business, the presumption is very strong that he did it at his dwelling-house.

For the *defendants* it was said, that if the plaintiff was taxable for any property at all in *Newburyport*, it could not be a question here whether he was overtaxed or not. If he had a right to complain on that score, he must apply to another forum for relief. But having given no list, he was doomed by the assessors, and he cannot now ask for an abatement of his taxes. The facts incontestably show an increase of his shipping since 1801. He hired and occupied a store; he sold merchandise from it by his agent. There can be no difference, whether the hiring was by the week or by the year; so that it was hired for the sale of goods.

The action stood over for advisement to this term; and now

The *Court* observed, that this action of trespass *vi et armis*, could not be maintained against the defendants as assessors,

* if the plaintiff was by law liable to be assessed by them for [* 240] any estate. Certainly not merely because he is overrated. So that the only question to be decided was, Was he liable to be taxed in the town of *Newburyport* at all? On this question they had no doubt. He hired a store in that town, and he sold merchandise, and he fitted ships there. For all the stock in trade, which he negotiated and managed in *Newburyport*, he was regularly taxable there. For his business as an underwriter, and for his shares in the stock of insurance companies, banks, and other incorporated funds of that kind, he was to be taxed by the assessors of the town of *Newbury*, of which he was an inhabitant.

It appears, then, that the only subject of the plaintiff's complaint is that he was overrated; and for this he should have pursued the remedy provided by the statute.

Plaintiff nonsuit.

PHINEHAS STEVENS, Plaintiff in Error, *versus* JOHN BLUNT

A promissory note payable to *B*, or order, "on the — day of —, or when he completes the building according to contract," was holden to be payable at a day certain, and negotiable.

ERROR to reverse a judgment of the Court of Common Pleas for this county, wherein the said *Stevens* was plaintiff, and the said *Blunt* was defendant.

The original action was case upon a promissory note, signed by *Blunt*, payable to one *Solomon Stevens*, or order, and by him endorsed to the plaintiff.

At the trial in the court below, the plaintiff gave in evidence a note of the following tenor, *viz.* "*Trenton, Oct. 29, 1806. This may certify that I do agree to pay unto Solomon Stevens or order forty dollars by the twentieth of May, or when he completes the building according to contract. John Blunt,*" with the following endorsement on the back thereof, *viz.* "*Pay to Phinehas Stevens or order. Solomon Stevens.*"

The defendant's counsel objected that the action was not maintainable, because the said note was payable on a contingency, * and not at all events, and therefore was not [* 241] negotiable. And of this opinion was the Court of Common Pleas, and they so instructed the jury, who found their verdict accordingly for the defendant. The plaintiff's counsel

STEVENS vs. BLUNT, in Error.

filed a bill of exceptions to the opinion of the court, which was sealed by the *chief justice* of that court, and from which the foregoing statement is taken.

Putnam, for the defendant in error, now urged the objection which he made successfully at the Common Pleas.

But *the Court* held the note payable absolutely at a day certain, and they reversed the judgment of the Common Pleas, and ordered a new trial at the bar of this Court.

Story for the plaintiff in error. (a)

(a) [This decision is clearly wrong. The promisor had a right of election to pay either at the time mentioned, or when the building should be completed, according to contract. The latter event might never take place; and, therefore, the note, at the election of the promisor, was payable on a contingency, which might, or might not, happen.—ED.]

—◆—

WILLIAM TRASK *versus* ROBERT STONE.

To an action by an infant plaintiff, who sued by *A, B*, his next friend, the defendant pleaded in abatement that the plaintiff's mother was living, and that the suit ought to have been prosecuted by her, as guardian by nature, &c. The plea was held ill, it not being matter in abatement; but if material, it was ground for a motion to stay proceedings.

THE plaintiff was an infant under the age of eight years, and sued this action, "by *Niles Tilden*, of, &c., the next friend of the said *William*, who is admitted by the Court here to prosecute for the said *William*, in a plea of trespass," &c.

The defendant pleaded in abatement, admitting the infancy, but averring that *Mary Trask*, of, &c., is the mother and surviving parent of the said *William*, and the guardian by nature and nurture of the said *William*; and that the suit ought to have been prosecuted by her, as guardian of the said *William*, as aforesaid, and not by the said *Niles Tilden*, as the next friend of the said *William*, &c.; wherefore, &c.

To this plea there was a demurrer and joinder.

Curia. This is no cause for abating the writ. If there was ground for the objection, there should have been a motion to stay proceedings.

Respondeas ouster.

Putnam for the plaintiff.

Story for the defendant.

*COMMONWEALTH versus SAMUEL HUMPHRIES.

A larceny committed with actual force and violence, or with a constructive force, by any assault and putting in fear, is a robbery; and in an indictment for such offence, an allegation of force and violence is sufficient, without alleging that the party robbed was put in fear.

THE defendant was indicted for a robbery, at this term, and was tried and convicted at the sittings after the term before *Sewall, J.*, by whom I have been furnished with the following note of the case, which was read by him in Court previously to the prisoner's being sentenced.

"In the indictment, upon which the prisoner at the bar stands convicted, the allegations are, *that with force and arms, in the public highway, he feloniously assaulted one Peter Tracy, and one silver watch and watch-key, of his goods, &c., from the person and against the will of the said Peter, in the highway aforesaid, by force and violence did steal, rob, take and carry away, against the form of the statute; omitting the allegation heretofore usual in indictments for robbery, of putting in fear.*"

This omission occasioned some doubt in the minds of the *chief justice*, and the other *justices* of this Court, present, when the indictment was preferred by the grand jury, whether the description therein of the offence charged against the prisoner contained all the allegations essential to a technical description of the crime of robbery. Upon the conviction of the defendant, I thought him entitled to have this question examined, as the result might be some mitigation in his punishment.

The *chief justice*, and *Justice Parker* have advised with me upon the question, and the sentence now to be pronounced is in consequence of our concurrence in the opinion, that the crime of robbery is technically described in this indictment, and that the prisoner at the bar is legally convicted of that offence.

By a recent statute of this commonwealth, (1) the punishment of robbery has been mitigated, and for the pains of death, confinement to hard labor for life has been substituted; and the offender liable to this punishment is thus described:—"Any person who shall by force and violence, * or other assault, and [* 243] putting in fear, feloniously steal, rob, and take from the person of another, any money or goods," &c.

This clause of the statute admits, perhaps, of some uncertainty in the construction. "*Putting in fear*" may be so connected with

(1) Stat. 1804, c. 142, § 7.

the preceding words, as to become an essential circumstance in describing the offence of robbery; as well when the assault is accompanied with actual force and violence, as when it is by a constructive force, as by menaces; and if putting in fear was essential in an indictment at the common law, the words of the statute are not sufficiently explicit to establish a construction, changing the definition of the crime or the form of the indictment in this respect.

This point has been carefully examined. Sergeant *Hawkins*, (2) in defining the crime of robbery, seems to make the putting in fear the circumstance which distinguishes the crime of robbery from any other larceny from the person; and for this he cites Lord *Coke* and Lord *Hale*, who give the same definition. But in commenting upon the several parts of their definition, it is expressed by all of them, that without putting in fear, or violence, it is not robbery; and that upon proof of violence the law implies fear, in *odium spoliatoris*. Sergeant *Hawkins* also states, that no robbery is within the statute, by which the offence is made punishable with death without benefit of clergy, but such as is alleged in the indictment to have been committed in or near the highway, and to have put the person robbed in fear; and for this last dictum he cites *Dyer's* reports (page 224.) The citation refers to a short note, which is to this effect: — "that one was indicted, for that, with force and arms, at, &c., in the highway there, forty shillings in money he feloniously took from the person of J. S. And he had his clergy; for it is not robbery, unless the person be put in fear, as by assault and violence."

[* 244] * *Blackstone*, (3) defines robbery "the felonious and forcible taking from the person of another, of goods or money to any value, by violence, or putting him in fear. And he observes that previous violence, or putting in fear, is the criterion that distinguishes robbery from other larcenies; and that it is not indeed necessary, though usual, to lay in the indictment that the robbery was committed by putting in fear; it is sufficient, if laid to be done by violence." This was the opinion of Justice *Foster* in delivering the opinion of the judges in the case of *M Daniel & Al.*; (4) and was also the opinion of the twelve judges, as it is explicitly stated in *Donnelly's* case, (5) by Justice *Willes*, in delivering their opinion, according to the report of that case in *Leach*. (6) And Baron *Eyre*, in his argument of the same case, as it is reported in *Eust*, (7) says that in the old precedents of indictments for robbery, the putting in fear is not alleged.

(2) 1 *Hawk. P. C. c. 34.* — 3 *Inst. 68.* — 1 *H. H. P. C. 531.*

(3) 4 *Comm. 243.*

(4) *Fost. Rep. 128.*

(5) *Leach's C. L. 229*

(6) *Vide Com. Dig. tit. Justices U 1*

(7) *East's Crown Law, c. 16, § 127, 130, 167.*

The result of this inquiry is, that we are not restrained by the common law definition of robbery, or by any precise form of the indictment, as to the circumstance in question; and without departing from any established principle, the construction may be, what the words cited certainly admit, that a larceny committed with actual force and violence, or with a constructive force by any assault and putting in fear, is to be adjudged a robbery; and that in this respect the statute has preserved the definition of the crime, as it was described and punished by the common law

A C A S E

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF SUFFOLK, NOVEMBER TERM, 1810.
AT BOSTON.

PRESENT:

HON. THEOPHILUS PARSONS, CHIEF JUSTICE.
HON. SAMUEL SEWALL, } JUSTICES.
HON. ISAAC PARKER, }

COMMONWEALTH *versus* CHARLES NEWELL AND FIVE
OTHERS.

The breaking and entering a dwelling-house, with intent to cut off an ear of an inhabitant, is not a felony.

THE prisoners were indicted for *feloniously* and *burglariously* breaking and entering the dwelling-house of *Edward Dixon*, of *Boston*, in the night of the 17th of August last, with the intent unlawfully and feloniously to assault the said *Dixon*, and to cut off one of his ears, with an intention the said *Dixon* to maim and disfigure; and after being so entered, for unlawfully and feloniously assaulting the said *Dixon*, and cutting off his right ear, with intention him to maim and disfigure, with set purpose, and of their aforethought malice, against the peace and the form of the statutes in such case provided.

The prisoners demurred to the indictment, and the demurrer was joined for the commonwealth by *Morton*, attorney-general.

Richardson, for the prisoners, contended that the crime charged in the indictment did not amount to a felony. To constitute the crime of burglary, there must be an intent to commit a felony. The intent alleged here is to cut off an *ear, [* 246] which was never felony at common law, nor has it been made so by any statute. Nothing but such a hurt of any part of a man's body, whereby he is rendered less able in fighting, either to defend himself or annoy his adversary, is properly maim. The cutting off an ear is expressly said by *Hawkins* (1) and by *Blackstone* (2) not to be a maim, and for this reason, because it does not weaken, but only disfigure a person.

Neither the statute of 37 H. 8, c. 6, which gives treble damages to the party for this injury, and a fine to the king, nor that of 22 and 23 Car. 2, c. 1, called the *Coventry* act, which, perhaps, under the words of cutting off any limb or member, may include this offence, and makes it a felony not clergyable, have been adopted here.

But whatever may be the grade of this crime, either at common law or by *English* statutes, our own legislature have fixed its specific nature, and annexed to its commission the punishment of imprisonment, thereby reducing it to a misdemeanor, and depriving it altogether of a felonious character. (3)

If it be said that the word "felonious," in the title of the act, and the expressions, "with set purpose and aforethought malice," in the enacting part, show the intent of the legislature that this crime should be held to be a felony; the case of *The Commonwealth vs. Barlow* (4) is express, that a misdemeanor cannot be considered as made a felony, but by express words, or by necessary implication. That case arose under this same statute, and is stronger than the present, for there the statute applies the word "felonious" to the offender in the enacting part.

Morton, (attorney-general.) All mayhems are felonies at the common law; and if the legislature increase the number of acts, which shall be considered as mayhems, such acts become *ipso facto* felonies. At common law the putting out of an eye was always a mayhem; and this statute puts it on the same footing with cutting off an ear. The title of the statute mentions felonious maims, and in the enacting *part the words used have [* 247] always been appropriated to felonies. *Barlow's* case

(1) *P. C. Lib.* 1, c. 44, § 2, 3.
(3) *Stat.* 1804, c. 123, § 4.

(2) 4 *Comm.* 206.
(4) 4 *Mass Rep.* 439.

does not militate with my position. The Court say, indeed, that an attempt to commit a felony is not now a felony; but they say, also, that a felony may be created by strong implication; and it is conceived that the language of the statute in question affords an implication of the strongest kind. In short, if cutting off an ear is not felony, neither is the cutting off an arm, for the statute makes no distinction between the two acts.

Richardson was stopped by the Court from replying.

The next day, the opinion of the Court was delivered by

PARSONS, C. J. The objection to the indictment is, that the facts therein found do not amount to felony. The breaking and entering of a dwelling-house in the night is not burglary, unless it be done with an intent to commit a felony. This position the *attorney-general* has not contested. The question for our decision then is, whether the cutting off the ear of *Dixon*, of set purpose and of malice aforethought, with the intention to maim and disfigure him, is by our laws a felony; for if it be not a felony, an intention to do it cannot be an intention to commit felony.

That the cutting off an ear, maliciously and of set purpose, with the intention to maim and disfigure is not a mayhem by the common law, is not denied; but the *attorney-general* has insisted that the statute of 1804, c. 123, has made the cutting off the ear, with the disposition and intention aforesaid, a mayhem; that mayhem at common law is felony; and that, as a necessary conclusion, the cutting off the ear, maliciously and with the intention to maim and disfigure, is, by force of the statute, a felony.

By the ancient common law, *mayhem* was an injury of a particular nature, constituting a specific offence, the commission of which could be regularly averred by no circumlocution, without the aid of the barbarous verb *mahemiare*. It consisted in violently and unlaw-

fully depriving another of the use of a member proper [* 248] for his defence in fighting; * and was punished by a forfeiture of member for member, in consequence of which forfeiture it was deemed a felony. If the sufferer sought this satisfaction, or rather revenge, his remedy was by an appeal of mayhem; and the sovereign punished this injury done to his subject, by an indictment for a mayhem; and in both the appeal and indictment the offence must be alleged to have been committed feloniously.

A punishment of this description could have existed only in a rude state of civil society; and as civilization advanced, the punishment was disused, and the offender made satisfaction by paying pecuniary damages, and was punished by his sovereign by fine and imprisonment, in the same manner as in cases of trespass. So long

ago was this punishment disused, that *Staundford*, remarking on the statute of 5 H. 4, c. 5, which made the putting out of an eye felony, observes that before that statute it was not felony. He, however, subjoins a *quære*, and refers to *Bracton*.

This was the state of the common law, long before and at the time when our ancestors emigrated to this country, bringing with them but a very small part of the common law, defining crimes and their punishment. Mayhem was therefore never deemed by them a felony, but only an aggravated trespass at common law; and as such, the offender was answerable to the party injured in a civil action of trespass, and to the government upon an indictment for a misdemeanor; and no statute provision, during the existence of the colonial and provisional charters, recognizes mayhem as a distinct offence from trespass, or as constituting a specific felony. We are, therefore, obliged to consider mayhem as no felony by the common law adopted in this state.

Since the revolution, the only legislative provisions, relating to this offence, consider and punish it as a misdemeanor. If, therefore, the statute of 1804, c. 123, has declared the maliciously cutting off an ear, with intent to maim and disfigure, a mayhem, we cannot thence infer that it is *felony. [* 249] The statute, however, has not made that declaration.

It only enacts that if any person, with set purpose and aforethought malice, and with an intention to maim and disfigure, shall unlawfully cut off an ear of another, he, and every person privy, being present and aiding, or absent, having counselled or procured the commission, shall be punished by solitary imprisonment, and by confinement to hard labor. Here the word *maim* is used in the popular sense of *mutilating*, and not as synonymous with the technical word *mayhem*. The cutting off the ear is not called a maim, but is created an offence, when done with an intention to maim and disfigure, and punished as a misdemeanor; for a trespass may be committed with set purpose, and with malice aforethought.

The fifth section of the statute has been adduced, to support the attorney-general's argument; because it provides, that every man, who shall assault another, with intent to maim and disfigure him, shall be punished as a felonious assaulter. But this expression is descriptive of the temper, disposition, and character of the offender, and not of the legal nature of the offence. By the same statute, any person sending a challenge to fight a duel shall also be punished as a felonious assaulter; and very clearly the mere sending of the challenge is not even an assault. We are therefore satisfied, that the offence described in the indictment is not a felony, either by our common law or by any statute.

The attorney-general has argued, that if the indictment is not a sufficient description of a felony, yet it may be supported as an indictment for a misdemeanor.†

There are one or two ancient cases in favor of this position, as *Holmes's* case, (5) and *Martin Lesser's* case, in the time [* 250] of *Henry 4*, which is reported in *Cro. Jac.* 497. * But in a later case of *Rex vs. Westbeer*, (6) the old cases were considered and overruled. The Court, when the prisoner was discharged, observed that in the cases cited for the king, the judges appeared to be transported with zeal too far.

Thus stands this question at common law. But our statute of 1805, c. 88, in authorizing a conviction of part of an indictment for felony, restrains the conviction to cases, where the part, of which the prisoner is found guilty, constitutes of itself a felony. This provision seems to be a statute construction of the point, which leaves no doubt remaining.

Per Curiam. Let judgment be entered that the indictment is bad, and let the prisoners be discharged. (a)

Note. After this judgment was rendered, the prisoners were ordered, upon the motion of the attorney-general, to recognize for their appearance *de die in diem*, to answer for the misdemeanor; of which they were afterwards indicted, and during this term were tried and acquitted.

† This suggestion fell from the attorney-general, after the prisoners had pleaded not guilty, and before the demurrer was put in, and the plea of not guilty retracted.

(5) *Cro. Car.* 376.

(6) 2 *Str.* 1133.

(a) [In order to conviction, it is not commonly essential to prove the charge, to the whole extent, as laid in the indictment; it is in general sufficient if so much of the charge there specified, is proved, as constitutes an offence punishable by law. — (*Rex vs. Holingsberry*, 4 *B. & Cr.* 330. — *Rex vs. Hunt*, 2 *Camp.* 585. — 2 *Russ. on Cr.* 708, 2d *English* edition. — 2 *Deac.* 458, and the cases there cited.) — But where the indictment charges an offence in proper terms, and part of this charge constitutes a distinct offence, and in the trial for the whole charge as laid, the prisoner cannot have the same advantages in his defence as he might have in a trial upon a charge only for that part constituting such distinct offence; if the prisoner be not found guilty of the whole offence charged, but of that part only constituting such distinct offence, he cannot be convicted upon such indictment for such distinct offence. Thus, in *England*, where, in cases of felony, the prisoner cannot have a copy of the indictment, a special jury, or counsel to address the jury, but may have such copy, jury, and counsel, in cases of misdemeanor, it has been held that if a prisoner be indicted for felony, he cannot, upon that indictment, be convicted of a misdemeanor, embraced in the charge. But these decisions are not applicable in this country, where no such distinctions are made, in regard to the mode of trial for these different offences. Besides, in the case reported in the text, and in *Holmes's* case, where the charge did not amount to felony, the prisoner, being found guilty of a part of the charge, amounting to a misdemeanor at common law, might lawfully have been convicted of a misdemeanor. — (2 *Russell on Crimes*, 2d *London* edition, p. 483), note (a). — *Kelyng*, 29. — 2 *East. P. C.* 1023, c. 21, § 5. — *Rex vs. Scofield, Caldecot*, 397.) — The decision in the text, therefore, is clearly erroneous. — Ed.]

C A S E S

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF SUFFOLK, MARCH TERM, 1811,
AT BOSTON.

—◆—

PRESENT:

HON. THEOPHILUS PARSONS,	CHIEF JUSTICE.
HON. THEODORE SEDGWICK,	} JUSTICES.
HON. SAMUEL SEWALL,	
HON. ISAAC PARKER,	

[MEMORANDUM.— The *Chief Justice* was prevented, by bodily indisposition, from attending in Court during the first three weeks of this term, as was *Thatcher, J.*, during the whole term.]

—◆—

ABEL JONES & AL. *versus* SETH SPRING & AL.

Practice.— Depositions taken in term time, the Court not being in actual session, and the opposite party having notice, are received, though taken without an order of Court.

In this action, the defendants' counsel objected to the admission of a deposition at the trial, on the ground that it was taken in term time, and without an order of Court for the taking of it.

But it appearing, on inquiry, that the Court had adjourned over three days, during which the deposition was taken, and that the

defendant had due notice, *the Court*, (*absente Parsons*, C. J.,) without hesitation, overruled the objection.

Selfridge and *Rockwood* for the plaintiffs.

Munroe and *Hubbard* for the defendants.

Note. At the last November term in this county, *Ritchie* moved *the chief justice*, then sitting, for an order to take a deposition, on giving notice, &c. But the motion was denied, the *chief justice* observing that there was no necessity for such order, *ut audiui*.

[* 252]

* LEMUEL COFFIN, Petitioner, *versus* HENRY ABBOT.

Practice. — The affidavit of a petitioner for a review may be used on the hearing of the petition, to prove facts known only to himself.

Depositions of other persons are not received on such hearing, unless taken with the usual forms, as depositions to be used in the trial of a cause.

Slight evidence is sufficient to sustain such a petition, where the petitioner has had no trial.

THIS was a petition, pursuant to the statute of 1788, c. 11, for the review of an action of *assumpsit*, in which the petitioner had been defaulted at the Court of Common Pleas.

To prove the allegations contained in the petition, the petitioner offered his own affidavit, which was objected to by the counsel for the respondent, who insisted that such affidavit was never received, except on the first application, to obtain an order of notice to the opposite party. But *the Court* (*absente Parsons*, C. J.) overruled the objection, and admitted the affidavit to be read, so far as it went to substantiate facts, which, from their nature, could be known only to himself.

The counsel for the respondent, to show the consent of the petitioner to suffer judgment to go by default, offered the affidavits of sundry persons, which had been taken without notice to the petitioner. But the Court refused to receive them, observing that the same forms were required in this case, as in the case of taking depositions to be used in the trial, such as notice to the opposite party, &c. (a)

Note. It was observed by the Court, in this case, that slight evidence, on the part of the petitioner so circumstanced, is sufficient

(a) [On such an application, the affidavits of others were clearly as properly admissible as the affidavit of the plaintiff. — Ed.]

COFFIN, Petitioner, vs. ABBOT

to support the petition; although that evidence be contradicted by testimony on the part of the respondent; because the granting of the petition is not a trial of the cause, but merely a determination that the petitioner shall not be precluded from making a defence to an action brought against him.

The review was granted, the costs of it to be subject to the discretion of the Court.

Jackson and *Hubbard* for the petitioner.

The Solicitor-General and *Fuller* for the respondent.

[* 253]

* JAMES ELDREDGE & AL. *versus* JAMES FORRESTAL, AND
ESTHER, his Wife.

An actual corporeal seisin, or a right to such seisin, in the husband, during the coverture, is necessary to entitle the widow to dower: a legal seisin of a vested remainder is not sufficient.

THIS was a writ of entry, pending in the county of *Barnstable*, in which the demandants count upon the seisin of *James Eldredge*, their grandfather, and a devise by him to his son, *Jesse Eldredge*, their father, in fee simple, after the death of *Priscilla*, widow of the testator, and aver the death of the said *Jesse*, after his father, and in the lifetime of the said *Priscilla*, and her death afterwards, and an entry by the tenants thereupon, &c.

The action was tried upon the general issue, before *Sewall, J.*, at the last October term in *Barnstable* county.

It appears, from the judge's report of the trial, that the tenements demanded were parcels of the real estate of which *James Eldredge*, grandfather of the demandants, died seised, which, since his death, and the death of his widow, *Priscilla*, have been assigned and set off, by a warrant from the Probate Court for the said county of *Barnstable*, to the said *Esther*, who was the widow of the said *Jesse Eldredge*, but since his death has been married to the said *James Forrestal*, as her dower.

The last will of the demandant's grandfather, dated February 4th, 1804, and proved March 22, 1809, containing the devise alleged in the demandants' count, was given in evidence at the trial; and it was proved, or admitted, that, after the death of the said testator, his son, the said *Jesse*, died, leaving the said *Esther*, his widow, and the demandants, his only children and heirs at law; and that after-

 ELDREDGE & AL. vs. FORRESTAL & UX.

wards the said *Priscilla* died, before the said assignment of dower to the said *Esther*.

Upon this evidence a verdict was taken for the demandants, subject to the opinion of the Court, whether they were entitled to recover; and if not entitled, the verdict was to be set aside, and a verdict entered for the tenants.

The action was continued *nisi*, for the opinion of the Court, which was delivered at this term, (*absente Parsons*, C. J.,) without any argument at the bar, by

[* 254] · * SEDGWICK, J. There is no doubt that an actual corporeal seisin, or a right to such seisin, in the husband during the coverture, is indispensable to entitle his widow to dower; and that a legal seisin of a vested remainder is not sufficient for that purpose. As in this case there was an interposing estate for life, which was not determined until after the death of the husband, it is very clear that the tenant was not entitled to dower. The proceedings in the Probate Court are void; and judgment must therefore be entered on the verdict.

The Solicitor-General for the demandants.

Whitman for the tenants.

SAMUEL ROCKWOOD *versus* JAMES ALLEN, Executor.

When an officer had attached goods on an original writ, and pending the action, the defendant died, and his administrator took upon him the defence of the action, judgment was rendered against the administrator, and execution thereon delivered to the officer, who delivered up the goods to the administrator. This latter included them in his inventory of the intestate's estate; and on settling his account of administration, the judge of probate assigned to the intestate's widow all the effects that remained, after paying funeral charges, &c. No representation of insolvency was made. It was held that the officer was liable to the plaintiff, in the original action, for the value of the goods attached by him.

THIS action was originally brought against *Jeremiah Allen*, Esq., late sheriff of this county, (after whose decease the defendant came in and took the defence upon himself,) for the default of *George Jackson*, one of his deputies, in not levying the plaintiff's execution, issued upon a judgment recovered by him against *Richard Mero*, administrator of *Abraham Patch*, upon certain chattels, which *Jackson* had attached upon the original writ against *Patch*.

The action was tried upon the general issue, at the last November

 ROCKWOOD vs. ALLEN, Executor.

term in this county, before *Parker, J.*, and a verdict taken for the plaintiff, for the value of the chattels, subject to the opinion of the Court upon a case agreed by the parties.

The facts stated are, that the plaintiff having purchased a writ of attachment against *Patch*, for a cause of action which, by law, survived against his administrator, delivered the same to *Jackson*, who attached the chattels, and duly returned his writ. Pending the suit the defendant died, and *Mero*, his administrator, being admitted to defend, afterwards *made default; and [* 255] upon a judgment rendered against him, the plaintiff, within thirty days from the judgment, delivered to *Jackson* an execution upon said judgment, to be levied on the chattels which he had attached on the original writ. Instead of so levying the execution, *Jackson* delivered the chattels to *Mero*, upon his demanding them, while the execution was in his hands.

Mero returned to the Probate Court an inventory of *Patch's* estate, including the chattels aforesaid; and on settling his account of administration, the judge of probate assigned to the intestate's widow all the effects that remained, after paying funeral charges, &c. The administrator made no representation of the insolvency of the estate, and no commission of insolvency was ever issued; the judge of probate, for this county, thinking it unnecessary to grant commissions of insolvency upon estates, when it appears that no balance remains in the administrator's hands.

The questions reserved by the parties were,

1. Whether the said estate, not appearing by the records of the Probate Court to be insolvent, the insolvency thereof could legally be proved by parole testimony?

2. If said estate be proved insolvent, whether the attachment in the original suit of *Rockwood vs. Patch* was discharged thereby, without a representation and commission of insolvency?

3. If said attachment was not discharged, whether the plaintiff shall recover in this action the value of the goods attached, or nominal damages only? it being agreed that if the plaintiff is entitled to recover the value of the goods attached, the verdict was to stand, and judgment be rendered upon it.

The cause was submitted without argument, and the opinion of the Court (*absente Parsons, C. J.*) was delivered by

SEDGWICK, J. By the statute of 1783, c. 59, § 2, it is enacted that when any goods or estate are attached upon *any writ or process, in case the cause of action [* 256] does by law survive, the same shall not be released or discharged by reason of the death of either party, but be held good to respond the judgment, to be given in the suit, in the same man-

 ROCKWOOD *vs.* ALLEN, Executor.

ner as by law they would have been, if such deceased person had been living; provided that where any estate, so attached, shall, by the executor or administrator of the same, be represented as insolvent, and a commission of insolvency shall thereupon issue: in all such cases, attachments, made as aforesaid, shall have no force or efficacy after the death of the original defendant or defendants in the action.

In the present case, there was no commission of insolvency issued, nor any representation made by the administrator. The words of the statute are very clear and explicit. The attachment was not discharged, and the officer made himself liable to the plaintiff by neglecting to levy the execution on the goods which he had attached. The plaintiff is therefore entitled to judgment.

As to the question, respecting the measure of damages, it is a general and very sound rule of law, that where an injury has been sustained, for which the law gives a remedy, that remedy shall be commensurate to the injury sustained. The damages in this case are the value of the goods attached, it being understood that such value did not exceed the amount of the plaintiff's judgment in the suit upon which they were attached.

Judgment on the verdict.

Rockwood for the plaintiff.

The Solicitor-General for the defendant.

[* 257]

* ANDREW PETERS, Administrator, *versus* AMASA DAVIS.

A demand of copartners in trade belongs to the survivor to collect, notwithstanding an adjustment of all the concerns of the copartnership between him and the administrator of the deceased copartner, in which it was agreed that the proceeds of such demand should be equally divided between them.

CASE for money had and received by the defendant, for the use of the plaintiff, in his capacity of administrator of ——— *Davenport*.

A trial was had upon the general issue, before *Parker, J.*, at the last November term in this county, and a verdict taken for the plaintiff, subject to the opinion of the Court upon the following facts, reported by the judge who sat in the trial.

In 1798, a voyage was undertaken by the defendant and the house of *Rawson & Davenport*. The vessel, and one half of the

cargo, belonged to the defendant, and the other half of the cargo belonged to *Rawson & Davenport*. The cargo was taken by the *French*, and converted to the public use; and the defendant, as agent for the whole concern, endeavored to obtain compensation from the *French* government. In February, 1802, *Davenport* died, and the plaintiff was duly appointed his administrator. In two or three years after *Davenport's* death, the plaintiff and *Rawson* adjusted all the concerns of the copartnership, except a demand against the *British* government, and the demand against the *French* government, for the proceeds of the cargo above mentioned; and it was agreed between them, that whatever should be recovered on account of these claims, should be equally divided between the plaintiff and *Rawson*. The company of *Rawson & Davenport* was solvent until the death of *Davenport*, and *Rawson* continued solvent until August, 1805, when he absconded, being indebted to *Davis* more than the amount of the proceeds of half of the cargo as finally recovered. In 1806, under the *Louisiana* treaty, *Davis* received from the *United States*, on account and for the proceeds of the cargo taken by the *French*, as before mentioned, 3095 dollars 93 cents, the bills therefor being in the name of *Davis* and *Rawson*.

*The verdict was taken for one fourth part of that [* 258] sum, being one half of the proceeds of the part of the cargo belonging to *Rawson & Davenport*; the action being brought upon the ground, that, by the death of *Davenport*, and other circumstances in the case, there was such a severance of the property as entitled the plaintiff to recover *Davenport's* due proportion. There was no evidence of an assent on the part of the defendant to this severance, nor was there any formal notice of it to him, although it appeared, that about the time of the commencement of this suit, or since, he had been informed of the adjustment, which had taken place between the administrator and *Rawson*.

If, upon these facts, the Court should be of opinion that this action could be maintained, it was agreed that judgment be rendered on the verdict; otherwise the plaintiff to become nonsuit.

Parker, for the plaintiff, argued that he was entitled to his action, on the ground that this money had come to the defendant's hands long after the dissolution of the copartnership by the death of *Davenport*, and after the final adjustment of all the partnership accounts, while the parties were solvent. A surviving partner, by the law merchant, has no interest in the debts due to the copartnership, but to collect and pay them over as due. But this debt was never in fact due to the copartnership. The action is brought on the promise of the defendant, which the law implies, from his receipt of money belonging in good conscience to the plaintiff.

PETERS, Administrator, vs. DAVIS.

The circumstance of the bills being drawn in favor of *Davis* and *Rawson*, makes no difference in the case, nor is it easy to discern why they were so drawn. (1)

Jackson, for the defendant, insisted that no person but *Rawson*, could legally demand this money of the defendant. Its having been received after the dissolution of the copartnership, and the adjustment of their accounts, makes no difference in the rights or duties of the parties. The claim was always in *Rawson* [* 259] after *Davenport's* death, and * the remedy in every case of a joint debt survives. The case cannot be distinguished from that of a bond due at the dissolution of the copartnership, and an agreement that when the money should be received, it should be divided between the partners. In that case, if one of the partners died, it would hardly be suggested that an action would lie for his administrator to recover a moiety of the sum due.

This principle was recognized by the Court in the case of *Austin vs. Walsh*; (2) although the defendant there, having agreed to a severance of the interest of the joint creditors, was held responsible to one of them separately.

By the Court, (*absente Parsons, C. J.*) We are all of opinion that the plaintiff cannot maintain this action. Here was no such severance of the joint demand of *Rawson & Davenport*, as subjects the defendant to two actions for one cause. The whole adjustment of the affairs of the copartnership was between the plaintiff and *Rawson*: the defendant knew nothing of it, and if he had known it, he was not bound by it. The verdict must be set aside, and the plaintiff must be called.

Plaintiff nonsuit.

(1) *Com. Dig. title Merchant, D.* — 2 *Burr.* 1197, *Enys vs. Donithorne*. — 1 *Esp. Dig.* 117, *Garret vs. Taylor*. — 2 *Vern.* 233. — 1 *Salk.* 392, *Heydon vs. Heydon*. — *Doug.* 650, *Eddie vs. Davidson*. — *Watson's L. of Partnership*, 124, 128, 136, 146, 233, 300.

(2) 2 *Mass. Rep.* 405.

WILLIAM H. H. CHEALY AND ANOTHER, *versus* JAMES BREWER AND EBENEZER SEAVER, his Trustee.

A public officer, who has money in his hands to satisfy a demand, which one has upon him merely as such public officer, cannot, for that cause, be adjudged his trustee.

THE only question in this action arose from the answer of the supposed trustee to the usual interrogatory.

Question. "Had you, at the time of the service of this writ upon you, any goods, effects, or credits in your hands, belonging to the said *James Brewer*?"

Answer. "I had, as county treasurer, and not otherwise, the sum of twenty-one dollars and twenty-five cents, which sum was due to him for his services as a traverse juror at the Court of Common Pleas and Municipal Court, and which sum I was by law obliged to pay him."

* *Parker*, for the plaintiff, contended that the trustee [*260] was chargeable, inasmuch as by his answer he had not discharged himself, (1) but had confessed that he had in his hands moneys, which by law he was absolutely obliged to pay to the defendant; and this is a *credit* within the statute. If he is held by this process to pay the money to the plaintiff, he can protect himself against the defendant. It may be said that, by not receiving the money of the treasurer, he has virtually *intrusted and deposited* it with the treasurer, which brings the case within the very words of the statute; and no arguments *ab inconvenienti* can go the length to repeal the statute, which is the business of the legislature, and not of the judicial courts.

The supposed trustee employed no counsel.

The opinion of the Court (*absente Parsons, C. J.*) was delivered to the following effect, by

SEDGWICK, J. The question whether *Mr. Seaver*, who has been summoned as the trustee of *Brewer*, the principal defendant, shall be adjudged such, depends on the construction of the statute of 1794, c. 65.

By the preamble it appears, that the remedy, intended by the statute, was to enable creditors to obtain satisfaction of their debts out of the "goods, effects, and *credits*" of their debtors, "intrusted and deposited" in other hands, so that they could not be attached by the ordinary process of law. And the act provides that the goods, effects, and *credits*, so intrusted and deposited, may be attached, in whose hands soever they may be "so intrusted and deposited." And to show more clearly, if it were necessary, that the intrusting and depositing the goods, &c. in the hands of a stranger, so as to render them attachable by a creditor, must be by the debtor himself, the form of process prescribed by the act has these expressions, *viz.* "And whereas the said *E. F.* saith, that the said *A. B.* has not in his own hands and possession goods and

 CHEALY & AL. vs. BREWER & TRUSTEE.

estate, to the value of — dollars aforesaid, which can [* 261] be come at * to be attached, but has intrusted to and deposited in the hands and possession of I. K., trustee of the said A. B., goods, effects, and credits to the said value," &c.

From hence it clearly appears, that the goods attachable by this process, must have been previously intrusted to, and deposited in, the hands of the trustee by the debtor. And we are all of opinion, that in no case can such goods be so attached, unless the defendant, should they be withheld by the trustee contrary to the agreement between them, might maintain an action for them, unless he be prevented by something fraudulent in the agreement.

The consequence of this opinion is, that a public officer, who has money in his hands to satisfy a demand, which one has upon him merely as a public officer, cannot for that cause be adjudged his trustee. A contrary decision would be mischievous, as will appear from this single consideration — that it would suspend, during the pendency of an action, a possibility of settling the accounts of the officer, who should be summoned as the trustee; and it may be added, that it would unreasonably compel him to attend courts in every county in the commonwealth, to answer interrogatories.

Trustee discharged.

JOHN WAIT *versus* ARCHIBALD M'NEIL.

A verdict is not to be set aside, although it be given against the positive testimony of a witness not impeached, where there are circumstances in evidence tending to lessen the probability that such testimony is true.

ASSUMPSIT for goods sold and delivered. On a trial of the general issue before *Parker, J.*, at the last November term in this county, the plaintiff proved a delivery of the articles to the defendant, and a regular charge in his books, as of goods sold in the usual course of business.

The defence was, that *M'Neil* and *Wait* had engaged as partners in the manufacture of certain carriage-boxes; in which business the plaintiff was to advance all the stock, and the defendant to pay for all the labor; and the boxes, when made, were to be [* 262] sold by the plaintiff on the joint account, * and the profits to be divided. To prove this statement, *Archibald M'Neil, jun.* was sworn, who testified that before the articles were received by his father, he saw the latter and the plaintiff together.

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and heard it stated and assented to, that the business aforesaid was to be carried on in the manner above stated; that when the boxes were finished, the witness carried and delivered them at the plaintiff's store; and that the plaintiff was frequently at the manufactory, to see how the work went on. This latter fact was also testified to by other witnesses. The plaintiff swore several witnesses to prove that there had been no partnership; and among others his son, who was clerk in the store of his father, and had the management of his business, and had never heard of a partnership existing. Another witness testified that when the boxes were left at the plaintiff's store, neither he nor his son were present, and that nothing was said as to the cause of their being left there, and that afterwards they were taken away by the same person who left them; and it appeared that they were sent to auction by some person acting under the defendant's directions, and were there sold.

The judge instructed the jury, that as the goods, for which payment was demanded, were proved to have been delivered to the defendant in the ordinary course of business, the *onus* was on him to show that he was not accountable for them in this action; that if they believed the facts to be as stated by young *M'Neil*, their verdict ought to be for the defendant; otherwise for the plaintiff. They found for the plaintiff, and the defendant moved for a new trial, as upon a verdict against evidence.

Whitman, in support of the motion, urged that juries ought by the Court to be restrained and kept within the proper and established rules of the law of evidence; and when they overleap these bounds, their verdict ought not to avail. In the case at bar, the jury must have rejected the testimony of a witness who stood uncontradicted and unimpeached, and whom therefore they were bound to believe. * It is true that juries have a right to esti- [* 263] mate the credibility of a witness, upon whose testimony they are to find their verdict. But they are to do this according to settled established rules of evidence. They are not to act whimsically and capriciously in the matter; and unless a witness testifies plainly against truth, against other credible evidence, or in such a manner as shows he has no regard to what he is saying; or, unless the facts to which he testifies are so very unnatural or incredible as that it is next to impossible to believe him, they are bound to give him credit.

Thatcher, for the plaintiff, contended that, the cause being left to the jury expressly upon the credibility of the only witness, whose testimony went to question the plaintiff's right to recover; and they being the sole judges established by the law to determine that point, and having determined it according to their best discretion, there was

no ground to send the cause to another jury for a rehearing. The motion is not grounded on any of the known rules for granting a new trial, and the plaintiff is by the law of the land entitled to judgment on the verdict which the jury have rendered in his favor.

The opinion of the Court (*absente Parsons, C. J.*) was delivered as follows, by

SEDGWICK, J. The objection in this case is, that the verdict is against evidence; and if it be clearly and manifestly so, it certainly ought to be set aside. The plaintiff at the trial having proved his case, the only positive evidence against him was the testimony of the defendant's son. The Court will pay all due respect to the testimony of a witness, who stands uncontradicted and unimpeached; but the credit of every witness must be taken into the consideration of the jury; and this is peculiarly and emphatically within their province.

In this case there was little to corroborate the testimony of the witness. That the boxes, for the manufacture of which it [* 264] is understood the goods charged to the defendant * were delivered, were, when finished, carried and delivered at the plaintiff's store, is a circumstance relied upon for the defendant; but to this it may be answered, that, as the plaintiff kept a store in *Boston*, the boxes might have been brought there to have been disposed of, although the plaintiff had no interest in them, further than from the proceeds of the sale to obtain payment of the debt due to him from the defendant; and it may be added, that this circumstance is stripped of all its weight by the opposing fact, that the boxes were afterwards taken away from the plaintiff's store, by the same person who carried them there, without any consent, that appears, from the plaintiff. The only other fact, which appears in any degree to corroborate young *M'Neil's* testimony, is, that the plaintiff frequently went to see how the work went on during its progress. This he certainly might have done (although he was not interested as a partner) either from curiosity, or to enable him to form a judgment as to the probability of the goods manufactured affording a reasonable prospect of security for the payment of the debt, which the defendant owed him.

On the other hand, there were circumstances before the jury, and proper for their consideration, whether full credit ought to be given to the witness. *He was the son of the defendant.* The nature of the transaction itself afforded some ground for hesitation. It is certainly not common that partnerships exist without the terms being reduced to writing; and it certainly could hardly be expected, although there was a partnership without any writing, yet that it should be known only to one witness, and that witness the son of

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one of the parties. There was also another fact of no inconsiderable weight before the jury; the supposed partnership property was sold at auction by the sole order of the defendant, without the knowledge of the plaintiff, and without notice to him.

As the burden of proof, respecting the partnership, was on the defendant, if the jury did not pay full credit to * young M'Neil's testimony, they did right in the verdict [* 265] which they returned. On the whole, we are all of opinion that we cannot say that this verdict was so against evidence that it ought to be set aside. There must, therefore, be judgment rendered for the plaintiff upon it. (a)

(a) [The true question is, whether there was any thing in the case to justify the jury in disbelieving the witness of the defendant. It would seem, that there was not. And an arbitrary finding should not be allowed.—ED.]

PHINEHAS UPHAM AND ANOTHER *versus* SAMUEL SMITH.

Where one had made a promissory note payable on demand, and the promisee afterwards executed a letter of license to him, in which he covenanted to receive payment in five equal instalments, and that if he sued the promisor, contrary to the tenor and effect of such license, he should be discharged of all demands: The three first instalments were duly paid, and the fourth not being paid, the promisee brought his action upon the note before the fifth was due:— It was held that the action lay, and that the plaintiff was entitled to recover the whole balance due by the note.

ASSUMPSIT on a promissory note made by the defendant, dated February 1, 1808, and payable to the plaintiffs or their order on demand.

The case came before the Court upon a statement of facts, in which it was agreed that the note was made as declared on, and for a good consideration; that on the 8th day of the same February, the plaintiffs, with other creditors of the defendant, executed a letter of license to him, in which the creditors covenanted to receive of him payment of their respective debts in five equal instalments, of six, nine, twelve, fifteen. and eighteen months; and if any trouble, wrong, damage, or hinderance, should be done to him, either in his body, goods, or chattels, by them, or either of them, contrary to the tenor and effect of their said license, then the defendant should be acquitted and discharged, as respected such creditor or creditors, by whom he should be vexed, arrested,

troubled, attached, grieved, or damnified, of all actions, suits, dues, debts, and demands, of whatever nature, from the beginning of the world ; that the three first instalments on the said note were duly paid ; that the fourth instalment was overdue and unpaid at the commencement of this action, but the last was not then due according to the terms of the said letter of license.

If, upon these facts, the Court should be of opinion, that the said letter of license was a legal bar to the present action, the plaintiffs agreed to become nonsuit ; if the plaintiffs [* 266] *should be entitled to recover, judgment to be rendered for them for such sum as the Court shall be of opinion they are entitled to recover, with costs.

Thurston, for the defendant, contended that the letter of license was a good bar to any action brought before the expiration of the eighteen months limited therein for the payment of the last instalment ; (1) and if it should not be held to be a bar to the action, he insisted that the plaintiffs were entitled to recover only the fourth instalment.

Rockwood for the plaintiffs.

The opinion of the Court (*absente Parsons*, C. J.) was delivered as follows, by

SEDGWICK, J. (after reciting the facts.) There are two questions in this case — 1. Whether the plaintiffs are entitled to recover any thing ; and, 2. Whether, if they recover at all, they shall recover the whole amount due by their note, or the fourth instalment only, which, according to the terms of the deed, was due at the commencement of the action.

No authorities directly in point upon this subject were shown to the Court upon the argument, nor have any been since discovered by them. The action must then be determined by the meaning, as well as it can be perceived, of the deed executed by the plaintiffs and others.

The defendant's note was due at the time of the execution of the deed. The plaintiffs covenanted to receive payment in five equal instalments ; the first in six months, and the others each after an interval of three months. The three first instalments were paid in conformity to this stipulation : there was a failure of paying the fourth according to it ; and the fifth was not due when the action was commenced.

The covenant which succeeds the agreement for postponing the payment, although voluntary and gratuitous on the part of the plain-

(1) *Bac. Abr. tit. Release, A. 2. — Carth. 63, 64, 210. — Show. 47, 331. — Com. Dig. tit. Release, A. 1.*

tiffs, is yet binding on them ; and the defendant is entitled to the full benefit of it, according to its true intent and meaning.

But it appears to us, that * the covenant of the plain- [* 267] tiffs implied mutuality ; or, in other words, an agreement on the part of the defendant to pay punctually, according to the terms prescribed by the indulgence of his creditors ; and that he could claim the benefit of that indulgence only as he should comply with those terms. The covenant of the creditors was, in the understanding of the parties, that they would not molest the defendant, if he should pay accordingly as they stipulated to receive their debts ; but, if he did not, the engagement on their part was at an end, and the parties stood in relation to each other as if no agreement had been made.

That the fourth instalment was due at the commencement of the action, upon every principle of justice and reason, there can be no doubt ; and we are not certain that, if judgment should be rendered for that only, the plaintiffs would have any action to recover the remaining fifth part. The express contract here is all on one side : the original debt is one, and the promise to pay it is entire : the defendant has not, in words, undertaken to pay it by instalments ; and we know no case, which has determined that an entire debt can be broken into *several*, so as to authorize several actions, without a new and express undertaking to that effect.

But this is not necessary to be determined, as we are all of opinion that the defendant can claim no benefit from the agreement, because he has not complied with the terms, on which alone the plaintiffs covenanted not to molest him.

Pursuant to the agreement of the parties, judgment must be entered for the plaintiffs for the balance due upon the note.

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* EDWARD S. LONG AND ANOTHER *versus* DAVID GREENK
AND ANOTHER.

When *A*, a merchant at *W*, at the request of the agent of *B*, a merchant at *X*, had given his bond at the custom-house in *W*, for the duties on certain goods consigned to *B*, and had sent them coastwise to *X*, with a certificate proper to entitle them to a drawback of the duties, which certificate was withheld from *B*, until he should furnish *A* with an indemnity against his bond ; and that not being done, the certificate was never delivered, whereby *B* lost the drawback : — *B*, was still held to pay to *A* the amount of the duties he had paid in discharge of his bond.

ASSUMPSIT for money paid, laid out and expended by the plaintiffs for the use of the defendants.

The action was tried upon the general issue before *Parker, J.*, at the last November term in this county.

It appeared in evidence at the trial, that forty hogsheads of sugar had been consigned, by a merchant in *Demerara*, to the defendants, merchants in *Boston*; and that the master of the vessel, instead of bringing them directly to *Boston*, according to the bills of lading, carried them in his vessel to *Portsmouth*, where the owner of the vessel resided. The sugars were afterwards shipped to the defendants in *Boston*, who received and disposed of the same.

The plaintiffs, together with, and at the request of one *Sweett*, since deceased, who undertook to act as agent for the defendants, and who was afterwards recognized as such, gave their bonds at the custom-house in *Portsmouth* for the duties on the sugars, which were afterwards transported coastwise to *Boston*, and received by the defendants. The coastwise certificate, necessary to obtain a drawback of the duties upon the sugars, was transmitted by the plaintiffs to their agent in *Boston*, with instructions not to deliver it to the defendants, unless they should furnish the plaintiffs with a sufficient indemnity against the payment of the duties.

The sugars were sold by the defendants at auction, as entitled to *debenture*; but, though repeated applications were made by the defendants for the said coastwise certificate, to the plaintiffs' agent who possessed it, the latter refused to deliver it unless the defendants would furnish the said indemnity, which they declined doing; and the certificate was not delivered, although frequently offered to the defendants upon the condition before mentioned; and, in consequence, the benefit of the drawback was lost to [* 269] the defendants, who were obliged to refund the amount thereof to the purchasers of the sugars.

The plaintiffs, having paid the duties some time after the bonds became due, brought this action to recover the amount so paid. The defence set up was, that the plaintiffs not having delivered the said certificate, and the defendants having thereby lost the benefit of the drawback, the plaintiffs were not entitled to recover.

The jury were instructed by the judge, who sat in the trial, that the plaintiffs were not obliged to deliver the certificate to the defendants, unless they were previously indemnified against the payment of the said duties. The jury gave their verdict for the amount of the duties so paid; the defendants moved for a new trial, on the ground of misdirection of the judge, having excepted before the ver-

dict to the direction so given by the judge to the jury ; and the action stood continued over upon the said motion.

And now, at this term, *Amory*, for the defendants, argued that the plaintiffs having volunteered their services in giving bonds for the duties, and through their folly or obstinacy having prevented the defendants from deriving any benefit from their act, they had no right to maintain this action. The defendants neither requested them to give the bonds, nor engaged to indemnify them ; although, if they had done all their duty, and furnished the defendants with the means of obtaining the drawback, these latter would thus have been enabled and disposed to indemnify the plaintiffs. This being all one transaction, the agents ought to show that they have done all their duty, and given to their principals all the benefit they were entitled to.

For the plaintiffs, it was said that these transactions were wholly independent of each other. If the plaintiffs were not justified in retaining the certificate, until they were indemnified, let the defendants bring their action for the wrong. But it can in no view be a proper offset to this action.

* The plaintiffs had a lien on the sugars for an indemnity : having delivered them to the defendants, they still had a lien on the drawback, and on the certificate necessary to the obtaining it : (1) the defendants had no claim on the plaintiffs to furnish them with the means of obtaining the drawback ; and the plaintiffs might lawfully hold the certificate, until their reasonable request was complied with. It was the folly and obstinacy of the defendants in refusing such compliance, which has caused the misfortune, and they, not the plaintiffs, ought to bear the inconvenience.

Amory, in reply. The certificate was not the property of the defendants, nor can they maintain an action against the plaintiffs for the detention of it ; but in an action of this equitable kind, it is proper to receive every fact which may go to mitigate the damages. The plaintiffs had a right to retain the sugars until indemnified ; but it is not easy to see what lien they had upon the certificate, which gave them no security nor benefit, and was to them of no value. Here has been a loss of money ; and the question is, Whose shall the loss be ? Certainly it ought to fall upon those, from whose misconduct the loss arose, and not upon the defendants, who have had no agency in procuring it.

The opinion of the Court (*absente Parsons, C. J.*) was delivered by

SEDEWICK, J. The bonds in this case having been given at the

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request of the defendants, or, what is equivalent to it, and the money having been paid in consequence of it, the plaintiffs are undoubtedly entitled to recover, unless the defendants are justified in withholding payment on the principles of their defence.

The sugars were sold as entitled to debenture; and had the certificate, received at the custom-house in *Portsmouth*, been delivered to the defendants, they might have obtained debentures, which would have enabled them to discharge the bonds that had been given to the plaintiffs. The defendants repeatedly applied for the certificate; but the plaintiffs' agent, who had it in possession, refused to deliver it, in conformity to the orders he had received from his principals, not to deliver it, unless security was given to indemnify them in paying the duties.

That it was reasonable that the plaintiffs should be indemnified, there can be no doubt; and the withholding the certificate, to compel the defendants to perform their duty by giving the security required, seems not to be unjust or oppressive. And if this is not a sufficient excuse, then this is the common case of one man having paid money for another, at his request.

Judgment on the verdict
The Solicitor-General and Thurston for the plaintiffs.

BENJAMIN BARNES *versus* ROBERT TREAT AND JAMES ALLEN, Esq., his Trustee.

An executor cannot be charged as the trustee of one, to whom a pecuniary legacy is bequeathed by the will of the testator.

THE principal defendant in this case having been defaulted, the question brought before the Court was, whether Mr. *Allen* was holden as his trustee, upon the following facts appearing from his declaration on oath.

Jeremiah Allen, Esq., late sheriff of this county, died on the twelfth day of February, 1809, leaving the supposed trustee sole executor of his last will, which was duly proved, and execution thereof committed to the trustee on the twentieth day of the same month, and which contained the following clause:—"Fourthly, I give to Mr. *James Eunson* two thousand dollars, to be paid within one year after my decease, he having suffered as bondsman to my deputy *Symmes*; and I give to Major *Treat*," (the defendant in this action,)

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"another of his bondsmen, one thousand dollars, to be paid at the same period."

Sullivan, for the plaintiff, contended that this legacy was a *credit* of the defendants', liable to be attached by this process. And he cited *Toller's law of executions*, 24, to show that the title of the executor relates back to the death of the testator, and therefore it was not essential that in * this case the trustee [* 272] was summoned before probate of the will.

For the principal point he relied on the case referred to by *Sewall, J.*, in delivering his opinion in the case of *Wentworth vs. Whittemore*; (1) where "an executor, who was summoned as the trustee of a legatee, to whom a legacy was given, payable at the end of one year from the decease of the testator; although the executor, in his answer to the usual interrogatory, stated that he was not certain there would be any thing in his hands for the payment of legacies, after he should have paid the debts of the testator; yet the action was sustained, and the executor adjudged to be a trustee within the statute." This was a much stronger case than that at bar, for here there is no question as to assets.

J. T. Austin, for the trustee, argued that an executor can in no case be held as the trustee of a legatee in virtue of a pecuniary legacy. Such a legacy is neither goods, effects, or credits belonging to the legatee. Nor can it be said of such a legacy that the legatee has intrusted or deposited the legacy with the executor.

The eleventh section of the statute of 1794, c. 65, giving this process, provides that if the person summoned as trustee die pending the proceedings, his executor or administrator shall be liable, &c. But the executor or administrator of an executor is a stranger to the will of the first testator, and can never, as such, represent the first executor.

The whole reason of the case of *Wilder vs. Bailey* (2) applies as well to the case of an executor, as of a sheriff summoned as trustee.

Again; it depends on many contingencies, whether this legacy will ever be payable. At the time the process was commenced, it was uncertain whether *Mr. Allen* would accept the trust; or if he accepted, the judge of probate might not see fit to give him the execution of the will; or he might not offer sufficient sureties; or the will might * not have been proved; a posterior [* 273] will might have been produced; or the testator might be proved incapable of making a testament; and if the will was proved, and the executor duly appointed, still the estate might not

(1) 1 *Mass. Rep.* 472.(2) 3 *Mass. Rep.* 289

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exceed the debts; or a posthumous child might be born. It has been well settled, that a contingent demand cannot be the subject of this process.

Further, executors are not compellable to pay legacies, without receiving a bond from the legatee to refund in certain cases; but if they may be held as trustees to the legatee, then they must pay the legacies without such security.

The case cited from 1 *Mass. Rep.* was while contingent demands and moneys in the hands of sheriffs were held subject to this process, and it was also after probate of the will.

Sullivan, in reply. The case of moneys in the hands of sheriffs, and other public officers, rests on a very different principle. The law places the money in their hands, and this process, if binding, would prevent the execution of their duty.

It appears here, from the answer of the trustee, that he has assets, and that he holds himself bound to pay this legacy; so the demand cannot be considered as contingent.

The opinion of the Court (*absente Parsons*, C. J.) was delivered, as follows, by

SEDGWICK, J. The question in this case is, whether an executor, before probate of the will, can be summoned, and afterwards charged as the trustee of one to whom a pecuniary legacy is given by his testator, he having sufficient assets to pay all debts and legacies.

Formerly, executors, under the circumstances of *Mr. Allen*, as disclosed by his answers, were adjudged trustees; and so also were officers, who had in their hands money collected on executions. This, however, was done under the provincial statute on this subject; between which and the act now in force there is considerable difference. By the statute now in force, "goods, effects, and credits, intrusted and deposited" in the hands of a stranger, are [* 274] attachable. * Now, pecuniary legacies, in the hands of an executor, are not goods or effects; and it is equally clear that in no proper sense can they be denominated credits. Without the relation of a creditor and a debtor, there can be no such thing as a credit; but a legatee can in no proper sense be said to be the creditor of a testator; nor a testator, merely as such, the debtor of a legatee.

This question, in relation to an officer having money in his hands, collected on an execution, was fully considered in the case of *Wilder vs. Bailey*, mentioned at the bar; and the principles, which governed that case, apply with equal force to the case under consideration. In neither case is there a *credit*; nor was the subject, attempted to be attached, *intrusted* or *deposited*, in the sense

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of the act, in the hands of a person summoned as trustee. And it may be added, that the judgment provided in this process would be different from judgments in other cases against executors. In this case, to conform to the statute, it must be *de bonis propriis*, whereas in other cases it is *de bonis testatoris*.

The same principles, which were adopted in the case of *Wilden vs. Bailey*, have been again recognized this term in the case of *Chealy vs. Brewer*. On the whole, we are all of opinion that Mr. *Allen* must be discharged.

We have laid no stress on the circumstance in this case, that the service of the summons was before the probate of the will; because we are of opinion, that if the service had been after the probate, Mr. *Allen* could not have been adjudged a trustee.

Trustee discharged

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*JOHN BAXTER AND ANOTHER *versus* THE NEW ENGLAND
MARINE INSURANCE COMPANY.

The decision of a judge at a trial, that the sentence of a foreign Court of Vice-Admiralty is conclusive evidence of the facts alleged in it, does not militate with the rights of parties to a trial by jury, as secured by the fifteenth article of the declaration of rights.

THIS cause (vide vol. 6, page 277) was again tried at the last November term, in this county, before *Sewall, J.*, and a verdict being found for the defendants, the plaintiffs filed their exceptions to the opinion of the judge, which being allowed by him, the action stood over to this term for its final decision.

The action was case upon a policy of insurance, and tried upon the general issue. At this last trial, the plaintiffs proved the loss of the vessel by capture, soon after leaving the port of *Cadiz*; and that at the time of her departure it was not known or believed in *Cadiz*, that the said port was in a state of blockade, and that while the said brigantine was at the said port, and until her departure therefrom, neutral vessels, and especially *American* vessels, laden with merchandise, were continually arriving at and sailing from said port; whereupon the defendants produced in evidence the decree of the Vice-Admiralty Court, in *Gibraltar*, stated in the former report of this cause, and contended that it was conclusive evidence in their favor, and sufficient to preclude the plaintiffs from producing

any parole evidence to contradict said decree, and also from maintaining their action.

Whereupon the plaintiffs contended that, pursuant to the provisions of the constitution of this commonwealth, the said decree ought not to be adjudged to be conclusive evidence against them, and that by the same they were entitled to the benefit of parole testimony, relative to the existence of the blockade, or to any supposed violation thereof, by the said brigantine, during the said voyage and to the verdict of a jury thereon. And they produced, and moved the judge to admit parole testimony to prove that the port of *Cadiz* was not blockaded at the time referred to, and that the vessel had not, during her said voyage, violated any other existing blockade.

[* 276] * The judge refused to admit such testimony, and instructed the jury, that they were bound in law to consider the decree aforesaid conclusive evidence against the plaintiffs; and that the said decree could not be legally contradicted or invalidated by any parole testimony whatever.

This decision of the judge formed the ground of the plaintiffs' exceptions, and of their motion for a new trial, which came on to be heard at this term.†

Dexter, in support of the motion, cited the fifteenth article of the declaration of rights, viz. "In all controversies concerning property, and in all suits between two or more persons, *except in cases in which it has heretofore been otherwise used and practised*, the parties have a right to trial by a jury; and this method of procedure shall be held sacred, unless, in causes arising on the high seas, and such as relate to mariners' wages, the legislature shall hereafter find it necessary to alter it." And he argued that in the present case, the plaintiffs had, in effect, been precluded from this constitutional right to a trial by jury.

The execution of the policy, and the existence of the loss, were agreed. The defendants, to avoid the claim of the plaintiffs upon them, undertook to prove that the loss arose from the misconduct of the plaintiffs, or their agents, in violating a blockade: this the plaintiffs denied; and this was, in fact, the whole *controversy* between them. This controversy has not been tried by the jury, nor has the right to such trial been secured to the plaintiffs, within the plain sense and meaning of the article above cited. The trial in the Court of Vice-Admiralty was between other parties, and that court has no jury. The decree was then no evidence that the

† When this motion was first broken, and the grounds of it suggested to the Court, *Sedgwick, J.*, said he was totally opposed to hearing it, considering the subject is now been exhausted, and the point settled, by the former decision.

plaintiffs had there had the trial contemplated; neither in this Court have they had such a trial; for the decree being considered as conclusive evidence, they have been precluded from contradicting it.

*It is not denied that the Court are to judge of the [* 277] competency of evidence, or what particular evidence shall be permitted to go to the jury. But if, after admitting evidence, they go further, and decide, that the same is conclusive, and that no other evidence shall be received to contradict it, they exceed the constitutional limits of their authority; *they* try the cause, and not the jury. The plaintiffs offered evidence to prove that they had not broken any blockade; and such evidence as would, without any question, independently of the decree produced by the defendants, have been suitable and proper to establish the allegation. This evidence the judge rejected, and thereby deprived the plaintiffs of their right, and the jury of their proper powers and authority, as secured by the constitution.

Such a decision, resting on a prior decision, is determining the cause upon the issue of the former trial, to the exclusion of a jury; it is equivalent to saying, that the question having been once tried, it cannot be here tried again. The phrase "conclusive evidence" merely avoids the question. Perhaps there is no evidence, consistently with the provision of the constitution, properly conclusive, except a judgment of one of our own courts; where the party has had, or might have had, a trial by jury. The Court have not authority to determine, that a former trial, not by a jury, and in another country, has excluded the party from a right to a trial by jury in his own country. This is to settle the merits of the very question in controversy, without the intervention of a jury; and this being all the decision the controversy has had, the plaintiffs insist that they have yet a constitutional right to a fair trial by a jury. When the question between parties is a question of fact, as was the case here, for the Court to decide that the fact is already decided, is to take from the party, against whom the decision is, his right to a trial by jury.

This cannot be said to be one of the excepted "cases, in which it has heretofore been otherways used and practised."

The principle, which we are contesting, has never *been [* 278] adopted here, nor did a similar case arise within this province or state, prior to the adoption of the constitution. Neither, if the exception should be construed to extend to the usage and practice of the *English* courts, will it derive any support from that source. The point was never decided there before the framing of our constitution; and since that period there has been a great fluctu

ation of opinion upon it, among the judges who have sat in *Westminster Hall*.

Hall, to show the vacillations of the *English* courts, upon the question of the conclusiveness of foreign sentences, referred the Court to the cases of *De Souza vs. Ewer, Marsh.* 326.—8 *D. & E.* 444, note (a), Lord *Kenyon's* acknowledgment.—*Ibid.* 192, *Christie vs. Secretan.*—7 *D. & E.* 681, *Geyer vs. Aguilar.*—3 *Bos. & Pul.* 499, *Lothian vs. Henderson.*—1 *Camp. N. P. R.* 418, *Fisher vs. Ogle.*—*Ibid.* 429.

Jackson, for the defendants, believed that all the authorities pertinent to the question had been suggested to the Court at the former argument, or adverted to by them in forming their opinion; and he thought it but idle to trouble them with a repetition of the authorities or points formerly as well as now relied on. As to the objection from the declaration of rights, which had now been pressed upon the Court, he believed it had occurred in the former argument, although no great weight seemed to be then attributed to it either at the bar or on the bench. The plain intention of the article cited is, that questions of fact are to be decided by a jury. But the question in this case is not of fact; for the defendants substantially admit every fact alleged by the plaintiffs: it is wholly a question of law, arising out of the construction of the contract, on which the plaintiffs have brought their action.

The Court took time until the next morning, when their opinion (excepting the *chief justice*, who did not sit in the cause) was delivered as follows, by

SEDGWICK, J. The objection now made to the opinion [* 279] ion * which has, in this case, been delivered by the Court, is, that the jury, by the direction of the judge who tried the cause, were prevented from trying a question of fact, which ought to have been submitted to their consideration. The question of fact on the trial, it is said, was, whether the loss, for which the plaintiffs seek a remedy, was or was not incurred by a breach of blockade; and it is insisted that the plaintiffs ought to have been permitted to prove that there was no breach of blockade. The judge, in conformity to the opinion of the Court, determined that the decree of the Court of Vice-Admiralty was *conclusive* evidence of this fact; whereas, it is said, that the jury ought to have been permitted to receive other proper evidence to show that the fact, in truth, was otherwise.

The argument of the counsel for the plaintiffs is founded on the fifteenth article of the declaration of rights.

The first answer to be given to this objection is, that the parties had *in fact* a trial by jury. The action was *assumpsit*, and the plea

non assumpsit, and an issue was founded upon it. On the trial of this issue, a sentence of a Court of Vice-Admiralty was produced, and ruled by the judge, in conformity to the opinion of this Court, to be conclusive evidence of a fact decisive between the parties. Now, there are certain species of evidence, which, by the known and established rules of law, are conclusive; and it is the duty of a judge conducting a trial, whenever such evidence is produced, to pronounce it so. *Ad questiones legis judices, et non juratores respondent*. Other evidence is called *prima facie*, which, unless contradicted or explained, becomes *conclusive*; and there is other evidence to be weighed by the jury. In each of these instances, the nature of the evidence must be stated and explained to the jury by the judge. Now, it is believed that it was not the intention of the article of the declaration of rights, which has been cited, to alter, or in any degree affect those rules which the law had established for the security of our rights and property, or the relative rights and powers of judges and juries.

*In the next place, at the trial of this cause, there [* 280] was, in truth, no fact in controversy between these parties. This is frequently the case when the trial, in form and appearance, is a controversy of fact. Innumerable instances might be given, but sufficient will occur to every one acquainted with legal proceedings. In such cases the only question is the legal inference to be deducted from the fact. Such was the case here. If the loss sustained by the plaintiffs was incurred by a breach of blockade, they could never recover. To prove this fact, the defendants relied on the decree of the Court of Vice-Admiralty; and if that was conclusive evidence of the fact, their defence was complete. Whether it was or was not conclusive, was merely a question of law, wholly within the province of the Court, and certainly without that of the jury.

Again; the opinion of the Court was, that in such a contract of insurance, as that in this case, it is the understanding of the parties, that if there shall be a condemnation for a breach of neutral duties, the underwriters shall be discharged. If this opinion be correct,—and it cannot now be called in question,—then the decree in this case was *conclusive* against the plaintiffs.

Upon the whole, we are all of opinion that judgment ought to be rendered on the verdict.

SAMUEL VOSE, Plaintiff in Review, *versus* JOSIAH DEANE
AND ANOTHER.

A justice of the peace has no authority to take a recognizance from one charged as the receiver of stolen goods to the party from whom the goods were stolen, to secure to him the payment of the treble damages given by statute of 1784, c. 66.

THIS suit was prosecuted to review a judgment heretofore rendered in this Court upon a *scire facias*, brought by the defendants in review against the plaintiff in review, to have execution upon a recognizance entered into by the latter to the former, before a justice of the peace, as surety for one *John Harris*, charged before the magistrate as a receiver of stolen goods, the property of the defendants in review. The recognizance was con-
[* 281] ditioned for *Harris's* * appearance at the then next term of this Court, to answer to the said charge, and was intended to secure to the defendants in review the payment of the treble damages, in case of *Harris's* conviction. The *scire facias* alleged that he did not appear, nor did *Vose*, his surety, bring him in, although solemnly called, &c. After several continuances of the *scire facias*, judgment was rendered thereon against *Vose* upon his default; and upon that judgment execution issued, and was satisfied.

Upon the review, the plaintiff in review pleaded in bar, that during the whole term at which *Harris* was bound to appear, he was, by the providence of God, visited and confined to his house with sickness, and rendered utterly unable personally to appear, or to be brought to the Court. The defendants in review, in their replication, traversed the fact of the sickness, and tendered an issue to the country; which being joined, the jury returned their verdict, that *Harris* was in Court the first day of the term, but was unable, from severe indisposition, to attend any other day during the term. The action stood over to this term for judgment upon the verdict; and now,

Shaw, of counsel for the plaintiff in review, moved the Court for judgment; and in support of his motion he contended, 1. That there was no authority in the magistrate to take the recognizance. If he had such authority, it must be given him by statute. But the statute of 1784, c. 66, which was the only one in force at the time of this transaction, which relates to the subject, authorizes and directs a recognizance to the party from whom goods are stolen, to be entered into only for the appearance of the person charged with the

theft. No such provision is to be found as to the person charged as a receiver. If no such authority appertained to the justico, his act was merely void

Two other grounds of the motion were also stated, *viz.* that there was no regular declaration on record of the forfeiture of the recognizance; and that *Harris's* sickness, as *found [*282] by the verdict, was a sufficient and legal excuse for his non-attendance. But these last points were not considered by the Court.

For the defendants in review, it was argued that, the statute having provided that the receiver of stolen goods shall suffer like punishment as is to be inflicted on the thief upon a first conviction; and this Court having decided that the receiver is liable to the payment of the treble damages, as a part of the punishment; (1) and the statute having also provided that the principal offender shall recognize to the party injured, this recognizing may be considered as a part of the punishment, or as an incident to it. The law having enacted the penalty, it should seem that all the means, necessary to secure the end, should be implied.

There is no express provision for taking a recognizance from the receiver of stolen goods to the commonwealth. If the magistrate has authority to take such recognizance, which has never been questioned, he must derive it from the provision of the statute respecting the thief, or from the statute of 1783, c. 50, defining the powers of justices in criminal cases generally, by which they are authorized to take bail in all cases not capital, and not cognizable by themselves.

The interest in the treble damages being wholly in the party whose goods have been stolen, it is fit that the recognizance should be to him. Such has been the immemorial and constant usage. If it be now to be declared illegal, then receivers of stolen goods will forfeit their recognizances to the commonwealth, which are generally for inconsiderable sums, and will be gainers by their base traffic.

The opinion of the Court was afterwards delivered by

SEDGWICK, J. There are several questions presented to the Court in this case, one only of which is necessary to be determined; and that is, whether the justice of the peace, who took the recognizance, was authorized to take it.

It cannot be necessary to prove, that a ministerial officer can do no valid act, but what he is, either expressly or by

* necessary implication, authorized to do. In this case, [*283]

it is not pretended that a justice is *expressly* authorized to take a recognizance to the party injured, for the treble damages; and we are satisfied that he has no such power by implication.

The statute of 1784, c. 66, § 5, enacts that when any person shall be apprehended, charged with the crime of theft, and be admitted to bail, he shall not only recognize to the commonwealth, &c., "but he shall enter into another recognizance, with sufficient sureties, to the party injured, for treble the value of the articles, which he shall be charged with stealing." In the case before us, *Harris* was not apprehended on a charge of the crime of *theft*, nor charged with stealing; but he was charged with a crime as perfectly distinct from theft, although connected with it, as any other felony is. This, then, is not a case contemplated by the legislature, in which such authority is given to a justice.

Nor is such authority given by the statute of 1783, c. 51, § 1. This act authorizes justices of the peace to hold to bail all persons guilty, or supposed to be guilty, of offences less than capital, which are not recognizable by a justice of the peace. This statute preceded that of 1784; and certainly, by authorizing the *holding to bail*, did not comprehend a power to take a recognizance to the injured party, for his treble damages; a power then never given nor contemplated by the legislature; *bail* then being intended merely to secure the appearance of the person charged with a crime, at the court of which the recognizance was to be returned.

It is true, that, by the ninth section of the statute of 1784, the receiver of stolen goods may, before a conviction of the principal offender, be prosecuted and punished; and the act declares that "on conviction he shall suffer such punishment as the principal offender might have suffered on a first conviction. But this act does not, by any reasonable construction, give an authority to a justice of the peace to take a recognizance to the injured party for his treble damages.

On the whole, we are all of opinion that the justice had no legal authority to take the recognizance, on which the original action was brought, and that therefore no action can be supported upon it.

The following judgment was entered by order of Court: —

"It now appearing to the Court that the recognizance, upon which the judgment complained of was rendered, is null and void, and that the said *Vose* ought to be restored to all that he hath lost thereby: *It is therefore considered* by the Court, that the said *Deane* and *Raymond* take nothing by their original writ, and that the said judgment be reversed; and that the said *Vose*, the original defendant, and plaintiff in review, recover against the said *Deane* and *Raymond* the sum of —, being what he has originally lost by the said judg-

ment, with his costs by the said original suit, and his costs upon this suit taxed at ____."

Dexter and Sullivan for the defendants in review.

ELISHA DYER AND ANOTHER *versus* NATHANIEL LEWIS
AND ANOTHER.

Where one sold a vessel, and in the bill of sale described her as of certain dimensions and burden, when, in truth, she was of less dimensions and burden, it was held, that the purchaser could not maintain an action of the case against the seller, as for a false affirmation and promise.

THIS was an action of the case, in which the plaintiffs declared that the defendants, being owners of the schooner *Morning Star*, in consideration that the plaintiffs at the special instance and request of the defendants, would buy the said schooner, affirmed and promised to the plaintiffs, that she was of such length, depth, and breadth, and of the burden of sixty-nine tons; and that the plaintiffs, giving credit to the said affirmation and promise, at the request of the defendants, did buy the said schooner, for the sum of 1600 dollars. Yet the defendants, not regarding their said promise, but contriving to defraud the plaintiffs in this behalf, subtilely deceived them in this, that the said schooner at the time aforesaid was not of the length, depth, and breadth, nor of the burden aforesaid; but was of such * a length, depth, and breadth, and of the [* 285] burden only of sixty-one tons; and so the defendants, by means of their said false affirmation and promise, had greatly injured and defrauded the plaintiffs.

The defendants pleaded that they never promised, &c.; on which an issue was joined, and tried before *Parker, J.*, at the last November term in this county.

At the trial, the plaintiffs produced a bill of sale of said schooner from the defendants, not under seal, which stated her to be of the largest admeasurement mentioned in the declaration, with a warranty of the property, and also a deposition of one *Bishop*, proving that the vendors, by their agent at the time of the bargain and sale, represented and promised the plaintiffs that the vessel was in fact of such dimensions and burden; also the depositions of sundry persons, which proved that she was of less dimensions and burden than she was represented to be.

The judge instructed the jury that the said evidence was not sufficient to entitle the plaintiffs to their verdict for damages, and did not maintain the issue on the part of the plaintiffs, observing that there was no evidence that the defendants knew of the difference in the admeasurement, or that their affirmation to the plaintiffs respecting the same was untrue.

The jury returned a verdict for the defendants, and the plaintiffs filed their exceptions to the directions of the judge, and on that ground moved for a new trial.

And now *Parker*, in support of his motion, cited the case of *Stuart vs. Wilkins*, (1) to show that this was the proper form of declaring; and he relied on the evidence of *Bishop*, to prove an express warranty, and the other evidence stated, to show the breach of the warranty. (2)

Sewall, J., likened this to the case of *Powell vs. Clark*. (*Ante*, Vol. 5, 355.)

Thurston, of counsel for the defendants, was stopped by the Court.

Per Curiam, (*absente Parsons*, C. J.), Let judgment be entered on the verdict. (a)

(1) *Doug.* 18.

(2) 1 *Salk.* 3, 211. — 2 *Comyns on Contract*, 274.

(a) [Vide *Hastings vs. Lovering*, 2 *Pick.* 214. — Ed.]

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* CALEB HAYWARD *versus* WILLIAM RICHIE AND ANOTHER.

Practice. — Of costs to be taxed when an action is referred.

THIS action had been continued several terms under a rule of reference. At the last term, the referees made their report, which was accepted; but a question arising as to the costs to be taxed, the cause stood over to this term, for the direction of the full Court upon that point.

By the Court. When an action is continued from term to term under reference, the party recovering costs shall be allowed to tax his travel at the term when the rule is entered, and his attendance from the commencement of the term to the day on which the rule is so entered; at the term when the report is made, he may tax his travel and attendance until the report is accepted, recommitted, or discharged; and at each intermediate term, he may tax his travel and one day's attendance.

JAMES WISEMAN AND ANOTHER *versus* THEODORE LYMAN.

Where *A* receives, in payment of a debt due him from *B*, the promissory note of *C*, payable to *A*, such note is at the risk of *A*, unless there be an agreement to the contrary.

THIS action was *assumpsit* for money had and received by the defendant to the use of the plaintiffs, and was tried on the general issue, before *Parker, J.*, at the last November term.

From the report of the judge, and the papers used at the trial, it appears that the plaintiffs, merchants at *St. Lucia*, on the 3d of November, 1803, drew their two certain bills of exchange on *John Bolton*, of *Liverpool*, in the kingdom of *Great Britain*, in favor of *Luke Keefe*, the defendant's agent, and supercargo of his vessel, or his order; one of the said bills being for 34£, 18s. 9d. sterling, at sixty days' sight, and the other for 897£, 10s. sterling, at four months' sight. *Keefe* endorsed the bills to *Samuel Williams*, the defendant's correspondent in *London*, by whom they were presented for acceptance on the 5th of January, 1804, and protested for non-acceptance. Afterwards, on or about the 8th of May, 1804, upon the second bill's coming to maturity, * the said *Williams* received from *Bolton*, the drawee, the amount of the first bill, 316£, 2s. 8d., in part payment of the second, passing the said sums to the defendant's credit.

The protests for non-acceptance having been remitted to the defendant, he sent *Keefe* to *St. Lucia*, to demand payment of the bills of the plaintiffs, who paid the same on the 25th of July, 1804, receiving *Keefe's* full discharge. Part of the said payment was made in the promissory note of one *John Viges*, for 386£, 2s. 5d., *St. Lucia* currency, not endorsed by the plaintiffs, and payable in six months from the date. *Keefe* left the said note in the hands of an agent for collection; but it appeared that, although payment had been demanded, a part only of the sum due by it had been paid, and that *Viges* had become insolvent.

The jury returned a verdict for the plaintiffs, for the sum received by *Williams*, with interest thereon.

The judge reports, that the defendant resisted payment on the ground that *Viges's* note had not been paid, notwithstanding due diligence had been used to recover it; and that if the jury ought to have been instructed, that the said note, so taken by *Keefe*, should be deducted from the plaintiff's claim against the defendant, a new trial was to be granted; otherwise judgment was to be rendered on the verdict, with additional interest.

Jackson, for the defendant, contended that if the plaintiffs, upon the facts in this case, had a right to recover any thing of the defendant, they could not recover in this form of action. If the plaintiffs have any claim on the defendant, it must arise out of the transactions in *St. Lucia*, which were posterior to the receipt of the money by *Mr. Williams*, in *England*. The payment by mistake took place at *St. Lucia*; and as far as that was made in the promissory note of *Viges*, it was not money received by the defendant. (1)

But, independent of the objection to the form of action where an existing debt is discharged by an article which proves of [* 288] no value, the creditor may consider it as a nullity, *and the debt revives, or rather has never been extinguished. (2)

The Solicitor-General, for the plaintiffs, contended, 1. That the documents in the case showed that *Viges's* note was accepted by the defendant's agent as payment at the time he received it. *Keefe* gave his receipt as for so much cash, and the promisor being then solvent, it probably was estimated to be equal to cash. By our law, a negotiable security, given in consideration of a simple contract debt, extinguishes the debt; (3) although this may not be law in *England* or in *New York*, whence the defendant has produced all his authorities. But, in the case of *Richardson vs. Rickman*, cited in the case of *Kearslake vs. Morgan*, Lord *Mansfield* said that a negotiable bill accepted by the party was payment.

2. The defendant had elected to consider this note as payment. He had treated it as his own, by giving time to *Viges*, and by receiving a part of the amount a long time after it was due. (4) In the case of *Tatlock vs. Harris*, (5) *Buller, J.*, said, "Suppose *A* owes *B* 100£, and *B* owes *C* 100£, and the three meet, and it is agreed between them that *A* shall pay *C* 100£; *B's* debt is extinguished;" which is precisely the case before the Court.

3. The note has become payment by the defendant's neglect to enforce the payment of it. (6)

Dexter, in reply, insisted, 1. That the note did not extinguish the

(1) *Esp. Dig.* 99, *Noyes vs. Price*. — 5 *Burr.* 2589, *Nightingale & Al. vs. Devisme*. — 4 *D. & E.* 687, *Leery vs. Goodson*.

(2) 6 *D. & E.* 52, *Puckford vs. Maxwell*. — 7 *D. & E.* 64, *Owenson vs. Morse*. — 5 *D. & E.* 513, *Kearslake & Al. vs. Morgan*. — 1 *Esp. Rep.* 5, *Stedman vs. Goech*. — 4 *Johns. Rep.* 304, *The People vs. Howell*. — 5 *Johns.* 68, *Tobey vs. Barber*. — 2 *Johns* 455, *Markle vs. Hatfield*. — 2 *Caines's Rep.* 117.

(3) 5 *Mass. Rep.* 302, *Thatcher & Al. vs. Dinsmors*.

(4) 2 *Dallas* 100, *Watts vs. Willing*.

(5) 3 *D. & E.* 180.

(6) 2 *Wils. Rep.* 353, *Chamberlyn vs. Delarive*. — 3 *Cranch. Rep.* 311, *Harris vs. Johnson*. — 1 *Esp. Rep.* *Day's edition*, 106, *Bolton vs. Richards*, in *notis*.

defendant's demand upon the plaintiff. 2. That the defendant, never having obtained payment of the money due on the note, cannot be answerable to the plaintiffs therefor. 3. If the defendant is so answerable, yet the money cannot be recovered in this form of action.

The opinion of the Court (*absente Parsons, C. J.*) was afterwards delivered in substance, as follows, by

SEDGWICK, J. The first point for our consideration in this case, is the nature of the action. Where one man has in his hands money, which, according to the rules of equity and good conscience, belongs to and ought to be * paid to another, [* 289] this is the proper form of action for its recovery. If, then, at the commencement of this suit, the defendant held money, which *ex aquo et bono* he ought not to have retained from the plaintiffs, they are entitled to recover. This must depend on the facts appearing in the documents referred to by the judge in his report of the trial.

It will not be necessary to mention the names of the persons, who acted as the agents at the different times and places, in which the transactions occurred; since, in contemplation of law, their actions are the actions of the defendant.

From the facts, which I shall proceed to state, the plaintiffs insist that they are entitled to recover a sum of money equal to that which was paid on the bills in *England*; that amount being, at the time of the commencement of the action, in the hands of the defendant, which belonged to them.

The plaintiffs at *St. Lucia*, being indebted to the defendant, drew their bills for the balance upon *London*, which, being remitted to his agent there, was protested for non-acceptance, and the protests transmitted to the defendant. Afterwards, when the bills became payable, they were paid in part, and received by the defendant. A sum equal to the money so paid is what is claimed by the plaintiffs.

After this there were other transactions between these parties. More goods were sold by the defendant to the plaintiffs. When this was done, an account was stated between them, and a balance due to the defendant was struck. In this account, the bills, which had been drawn, were not taken into consideration at all, but treated as mere nullities. Some little time afterwards, it appears by the documents, that the note of *Viges* was received by the defendant, and payable to his agent, in discharge of the balance previously due to him.

As this balance, if paid, was a full discharge of every thing due to the defendant, independently of the money he * received in *London*, it becomes important to deter- [* 290]

mine whether *Viges's* note, under the circumstances, was a payment of that balance. For if it was, then the moment it was received, the money, which had been paid in *London*, ought no longer to be retained by the defendant, because it belonged to the plaintiffs.

Now, we can, none of us, perceive any difference between this case and the common one where a note of a third person is received in discharge of a stated balance of a merchant's or shop-keeper's account. If I am indebted to a merchant, and wish to discharge what I owe him, by procuring a man who is indebted to me to give his note for the balance, and it is so agreed by all concerned, and in execution of this agreement, the note of one, who may be supposed my debtor, is received for the balance due from me, made payable to my creditor, and that balance discharged by him, — no one, I believe, ever supposed, that if he ultimately failed to get the money on his note, he could recur to me *on the original contract*, and enforce payment, provided there was no unfairness on my part; and none is suggested or proved in the case before us. It is, in principle, like the case of a purchase of a horse, or any other property. A man purchases a horse, and by agreement the promissory note of a third person is received by the seller for the price agreed upon. All is conducted honestly between the parties. It was never imagined, I believe, that, upon the failure of the promisor, the seller could resort to the buyer, and recover of him the price of the horse.

There is no evidence, from any thing proved to have been said, at the time that *Viges's* note was received by the defendant, at whose risk it should be; nor in my opinion is it necessary on the part of the plaintiffs; because, from receiving the note, under the circumstances, it must be considered as payment, unless the contrary be made to appear as the agreement of the parties. Immediately, then, on the payment of the balance of the defendant's account [* 291] by other * means than the money which he had received in *London*, that money belonged to the plaintiffs, and this is the proper form of action to recover it.

Thus far we are all agreed: but for myself, I have no hesitation in believing, even if it had been proved that *Viges's* note was received at the risk of the plaintiffs, that the evidence, which the documents referred to in the report exhibit, would be decisive against the defendant, by proving that, before the commencement of the action, he had made the note his own, and that therefore it must be considered as payment. Those facts are, that it had been permitted, after it became due, to lie for more than three years, without any effort to collect it; and this under an agreement

relative to the payment of interest, made without the consent or knowledge of the plaintiffs.

The Court then observed, that on examination it appeared that the verdict had been taken for too much money; but, as this was a mere mistake, not taken notice of by either party at the trial, it could be no ground for setting aside the verdict, if the surplus should be released by the plaintiffs, which was accordingly done.

Judgment on the verdict.

JOSEPH COLCORD AND ANOTHER *versus* JAMES SWAN AND
HEPZIBAH, his Wife.

Where a wife joins with her husband in the conveyance of her lands with covenants of warranty, the lands pass by the deed, and the wife is estopped by her covenants; but she is not answerable in damages for any breach of them.

THIS was an action of covenant broken, brought upon covenants of warranty contained in a deed, executed by the defendants, and conveying the lands of the wife.

When the action was stated, *the Court* observed that it could not be maintained against the wife. Her executing the deed operates the conveyance of the land; but, although she is estopped by her covenants, she is not answerable in damages for any breach of them. The husband alone is liable.

* The plaintiffs' counsel then moved for leave to strike [* 292] her name out of the writ and declaration, and to proceed against the husband alone.

The defendants' counsel suggested that they had not known permission granted to strike out the names of defendants, except in actions for torts; and they observed that it would be singular that a fault, which would render the plaintiffs' judgment void, and which need not even be pleaded in abatement of the action, should be cured merely upon motion.

The Court granted the amendment upon the common rule, and the defendant elected a continuance.

Thatcher for the plaintiffs.

Otis and *Sullivan* for the defendants.

BENJAMIN LEVERETT *versus* JONATHAN HARRIS.

By the provincial laws in force prior to the statute of 1783, c. 32, which authorized the courts of law to license executors and administrators to sell the real estates of persons deceased for the payment of debts, &c., no certificate from the Probate Court of the necessity of such sale was required; but the same might be made to appear in any other way. — Therefore, when an insufficient certificate had been made in such a case 27 years before, and, in consequence thereof, a sale had been licensed by the Court of Common Pleas, the administrator in the subsequent proceedings having conformed to the requirements of the law, the heir at law of the deceased, in an action against the purchaser, for the recovery of the land sold under such license, was not permitted to give evidence that the personal estate of the deceased was sufficient for the payment of all his just debts.

THIS was a writ of *entry sur disseisin*, brought to obtain possession of an undivided ninth part of a certain messuage and appurtenances, situated on the westerly side of *Cornhill Street*, in *Boston*, in which the demandant counts upon his own seisin within thirty years, and upon a disseisin by the tenant.

The action was tried upon the general issue of *nul disseisin*, at the last November term, before *Parker, J.*; and a verdict being found for the tenant, the demandant moved for a new trial, upon the report of the judge.

From that report it appears, that it was admitted at the trial that *Thomas Leverett*, father of the demandant, died seised [* 293] of the demanded premises in the year 1778, leaving * his widow, the demandant's mother, and his children in possession; and the proportion claimed by the demandant is admitted to be right.

The tenant relied on a conveyance of the premises made to him by *Martha Leverett*, widow and administratrix of the said *Thomas Leverett*, and produced in evidence attested copies of an order of the Court of Common Pleas, for this county, made at April term, 1783, authorizing the said administratrix to make sale of the whole of the intestate's real estate, and to make and execute a deed or deeds thereof; and of her application to said court for said order, in which she set forth, that she had exhibited to the judge of probate inventories, a list of debts and accounts of her administration, so far as she had proceeded; that there was due from her intestate's estate the sum of 2216£, 3s. 1½d., which she had no personal estate in her hands to discharge, and that the real estate had been appraised at 533£, 6s. 8d.; and referring to the certificate of the judge of probate, in support of her allegations, she prays leave to sell, &c. The certificate of the judge referred to contains the same allegations

LEVERETT vs. HARRIS.

as the application. The tenant also produced the deed of the said administratrix, bearing date the 28th of July, 1783, by which, in consideration of £750, she conveyed the demanded premises to him; and in which she recites that the estate of her intestate was insolvent, that she had obtained license to sell all the real estate, and that the present tenant was the highest bidder; and covenants that the intestate died seised of the premises conveyed, that they were free of incumbrances, that she had good right and lawful authority to sell the same, and that she will, in her said capacity, warrant and defend the same against the claims of all persons. And it was admitted, that the tenant immediately entered on the premises under that deed, and has held the same to the present time. It was also admitted that the demandant was under age at the time of the sale, and soon after removed to *Portsmouth*, in *New Hampshire*, where he continued to reside until about two years before the trial.

*The demandant, to prove that the estate of the [* 294] intestate was not insolvent, and that the personal estate was more than sufficient to pay all his just debts, offered in evidence attested copies of the inventory, and the account of administration, and also the testimony of sundry witnesses.

But the judge, who sat in the trial, being of opinion that the certificate of the judge of probate, the license of the court founded thereon, the deed of the administratrix, and the possession under it for twenty-seven years, was conclusive evidence of the tenant's title against the heirs of *Thomas Leverett*, all the evidence so offered by the demandant was rejected by the judge; who adds, that if the Court should be of opinion that the said evidence ought to have been received, and to avail the demandant in this action, the verdict was to be set aside, and a new trial granted; otherwise judgment was to be entered on the verdict.

And now, at this term, a motion for a new trial was urged by *Dexter* and *Jackson*, of counsel for the demandant.

It was observed that the certificate of the judge and the application of the administratrix were artfully written. They did not state the value of the personal and of the real estate, nor did they allege that the former was insufficient to discharge the debts; because the fact was otherwise. They merely allege that the administratrix *had not in her hands* a sufficiency of personal estate for the discharge of the debts; and had the demandant been permitted to produce his evidence at the trial, the true reason why she had not, would have appeared, *viz.* that she had wasted it. Upon this application and certificate, informal and insufficient as they were, the Common Pleas proceeded to license her to sell the whole real estate

By the provincial statute of 8 *Will. 3, c. 4*, the Superior Court, and, by another act passed in 1770, the Court of Common Pleas, were empowered to license executors and administrators to make sale of the real estates of persons deceased, so far [* 295] as should be necessary to satisfy the * debts owed and legacies bequeathed by such deceased persons; but this authority is only given "where the goods and chattels belonging to the estate of any persons deceased shall not be sufficient to answer the just debts which the deceased owed, or legacies given; upon representation thereof, and making the same appear to such court." In this case there was no such representation to the Common Pleas, nor could it have been made to appear, for the fact did not exist. The Court of Common Pleas had then no jurisdiction in the case, and their act was merely void.

The demandant having shown a right to recover, the burden rests upon the tenant to disprove such right. For this he relies on an order of a court not authorized to make it. Relying upon that authority, it was his duty to look into it. If he had examined the files of that court, he would have seen that the authority was void; that the application, which alone gave it cognizance of the case, and which it recites as the foundation of its proceedings, was wholly insufficient for the purpose. If it be said that this is requiring too much of a purchaser, it may be answered, that the records were open to him, and he was bound to see that the vendor had authority. The mischief of thus depriving infant heirs of their inheritance, by a fraudulent sale, is vastly greater than the inconvenience of requiring purchasers to search the records. In the present case, the demandant was carried, when an infant, out of the state; and no argument ought, therefore, to be drawn from the length of time that the tenant has remained in his undisturbed possession of the premises.

Bigelow, for the tenant, was stopped by the Court; whose opinion (*absente Parsons*, C. J.) was afterwards delivered by

SEDGWICK, J. In this case the demandant is entitled to recover, unless the title set up by the tenant shall be adjudged sufficient to bar his right of inheritance.

By a statute of the provincial legislature, (8 *W. 3, c. 4*.) it was enacted that in case of a deficiency of personal assets [* 296] *to pay the debts or legacies of any deceased person, "upon representation thereof, and making the same to appear unto the Superior Court of Judicature, holden for or within the same county, where such deceased last dwelt, the Court are hereby empowered to license and authorize the executor or administrator of such estate to make sale of all or any part of the houses

and lands of the deceased, so far as shall be necessary to satisfy the just debts, which the deceased owed at the time of his death, and legacies bequeathed in and by the last will and testament of the deceased."

The same power was afterwards extended to the Court of Common Pleas.

By this statute, the certificate of the judge of probate, of the insufficiency of personal assets, and the necessity of sale, was not required. The court might ascertain the truth of those facts, upon any "representation thereof," or by any mode of "making the same to appear." As, therefore, the court was not restricted to any species of evidence, and as no certificate of the judge of probate was at all necessary, it seems very clear that no deficiency or irregularity in such certificate can invalidate the proceedings of the court, which might have been, and we are to presume were, founded on sufficient evidence.

The same answer may be given to the remarks, which have been made with regard to the insufficiency of the petition of the administratrix.

It will be admitted that the order of the Court of Common Pleas purported to bestow upon the administratrix sufficient authority to convey the demanded premises; and that she complied with all the requirements of the law, in the proceedings subsequent to the order of court, and in her conveyance. The grantee purchased in reliance on the authority of a court of competent jurisdiction. To deprive him of the property he thus acquired, would, in our opinion, be to act in opposition to the most established principles, and very much endanger the security of titles. (a)

* In *England*, all payments to, and purchases from, an [* 297] administrator are considered valid, although a will is subsequently discovered and proved.

Some reliance seemed to be placed at the bar upon the circumstance that the demandant was a minor at the time of the sale, and soon after removed from the commonwealth, to which he has lately returned. To this it is sufficient to reply, that in no statute, empowering a court to authorize a sale of lands by executors or administrators, is there a saving of the rights of persons under the circumstances of the demandant. (b)

Let judgment be entered on the verdict.

(a) [See note to *Thomson vs. Brown*, 16 *Mass.* 181. — Ed.]

(b) [There is now an exception in the statutes in favor of minors — Ed.]

CHARLES BARRETT AND ANOTHER *versus* THOMAS
ROGERS.

A bill of lading is *prima facie* evidence, and of the highest nature; but it is not conclusive evidence, in all cases, as to the condition of goods shipped in packages.

THIS was an action of the case against the defendant, master of the brigantine *Governor Sumner*. The declaration alleges that the defendant, at *Liverpool*, received on board his vessel three cases of merchandise, in good order and well conditioned, to be by him transported to *Boston*, for a certain stipulated freight, all and every the dangers and accidents of the seas and of navigation excepted, and there to be delivered in like order to the plaintiffs or their assigns; and the plaintiffs say that the defendant arrived safely at *Boston* with said vessel, yet that he did not deliver said merchandise to the plaintiffs, or their assigns, but negligently kept and secured the same, and suffered them to become wet and damaged, whereby great part thereof was lost to the plaintiff.

The action was tried on the general issue, at the last November term, before *Parker, J.*, from whose report of the trial it appears, that the correspondents of the plaintiffs, in *Liverpool*, shipped on board the brig, of which the defendant was master, three cases of velvets, for which he signed bills of lading in common form, promising to deliver them to the plaintiffs, or their assigns, in
 [* 298] good order and well *conditioned, the danger of the seas and navigation only excepted. The brig arrived, after a passage of about three months, with the merchandise, which was duly delivered to the plaintiffs, the consignees.

On the part of the plaintiffs, it was in evidence, that the hoops of the cases were rusty, the cases water-lined; and, on opening them, the goods were wet, and filled with particles of salt, but not rotten; and sundry persons swore that, in their opinion, they would have been rotten, had they been wet, as when opened, as many as twenty days.

On the other hand, the defendant proved that the goods were stowed either on or among crates of ware, well dunnaged, and perfectly secure from the salt, of which, together with coals and bales of goods, the cargo consisted; and some witnesses swore that they were delivered in perfectly good order, without any marks of damage upon them.

The plaintiffs applied to the defendant for a port-warden's certificate, which they did not obtain; and sold the goods at auction for

the benefit of the underwriters. The defendant produced no port-warden's survey, no protest, no evidence of any damage of the seas or of navigation, nor any evidence to prove a fraud practised upon him by the shippers or packers of the goods in *Liverpool*.

The plaintiffs' witnesses also swore that the goods would not have received any damage, if stowed as sworn to by the defendant's witnesses, and that the damage appeared to be recent.

The judge left the cause to the jury without any remarks upon the evidence, or any direction in matter of law, except that the bill of lading, signed by the defendant in *Liverpool*, was not conclusive evidence that the goods were in good order within the cases, when received on board the vessel.

At a former term of the Court, this cause was committed to a jury, who did not agree upon a verdict. At the term previous to that, at which the trial above recited was had, it was again committed to a jury, who returned a verdict *for [* 299] the defendant; as did also the jury at the last term, the cause being then tried upon review.

The plaintiffs move for a new trial, for the misdirection of the judge in matter of law.

Selfridge, for the plaintiffs, contended that the defendant was bound absolutely, by his bill of lading, either to deliver the goods shipped in good order, or, if they were damaged, to prove that such damage arose from causes within the exception contained in the bill of lading. If the shipper practised a fraud upon him, he has his remedy, but he must still answer to the consignee. The bill of lading is an instrument of great solemnity, and no presumption, that the goods were not in good order when put on board, ought to be received against the express terms of the instrument. The defendant might have qualified the bill of lading as he saw fit; he must, however, be bound by the actual terms of it, and abide the consequences of his own contract. (1)

Jackson for the defendant. The cases cited for the plaintiffs have no bearing on this cause. The first of them respected the sailing with convoy; and in the other there was no bill of lading; but the question was, whether the master had acted with due care and intelligence, or whether the damage sustained arose from the dangers of the sea.

If a bill of lading is conclusive evidence of the state of the goods in packages, the master, before he signs them, must open every

(1) *Abbott on Shipping*, 216, *Story's edition*, in notes. — *Ibid.* 250, *Smith vs. Shepherd*.

package, must examine each article, and must be skilled in the quality and appearance of each. Such a construction would be absurd, and put an end to the carrying of goods on freight. The utmost that he can be held responsible for is to deliver them, in case no sea-damage occurs to them, in the same order in which he received them. (2) If the shipper commits a fraud, the owner or consignee of the goods, whose agent he is, must look to him for a remedy, and not to an innocent carrier, who in fact knows nothing, and is not bound to know any thing, of the contents of the packages, or of their condition.

[* 300] *The evidence at the trial was contradictory, and, perhaps, not to be reconciled. It was the proper province of the jury to weigh it. They have weighed it; and unless the bill of lading is absolute and conclusive evidence of the situation of the contents of the packages, there is no ground of objection to the verdict.

The opinion of the Court (*absente Parsons*, C. J.) was afterwards delivered by

SEDGWICK, J. No objection is made to the verdict of the jury; and the only question, presented by the report before us, or by the counsel for the plaintiffs, is upon the direction of the judge, that a bill of lading, in a case circumstanced as this is, acknowledging that the goods to be transported are *in good order*, is not conclusive evidence against the party executing it, and charged with their not being in good order, but damaged, at the time of their delivery, although he cannot show that the damage received is within the exception contained in the bill itself.

That a bill of lading is an instrument of a nature to command great regard, and imposing a proportional obligation upon those who are bound for the execution of the responsibility which it assumes, there can be no doubt; but this responsibility must have reasonable limits, which must be determined by the nature of the subject-matter. If the property to be transported, and which was declared to be "*in good order*," was in all parts open to inspection, and no fraud or imposition was practised, it might not be unreasonable to say that no evidence should be admitted to prove that it was not in good order.

But in this case the property was velvets in cases, which were not open to inspection, and could not be rendered visible without opening the cases and unfolding the goods, which, it is believed, is never done. The *exterior* only was visible, and neither the *interior*, its quality nor condition, could be known to the master

(2) 1 *Valin*. 633, *Lib.* 3, *Tu.* 3

who signed the bill of lading, but from the representation of the shipper.

* That the bill of lading is *prima facie* evidence, and [* 301] of the highest nature, there can be no doubt; but that it cannot be conclusive in all cases, and, among others, in such a case as the one before us, is equally clear.

The ground of the result, to which the jury came, may not be very intelligible; but as two juries have concurred in it, we think, on that account, that the verdict ought not to be disturbed; and more especially as no objection is made to it, as being against evidence. (a)

Judgment on the verdict

(a) [Quære, if the verdict was not clearly against the evidence. — *Hastings & Al. vs. Pæper*, 11 Pick. 41. — Ed.]

NATHANIEL STURGES AND ANOTHER *versus* EDWARD H. ROBBINS.

A subscribed a memorandum of the following tenor, viz. “*The subscriber hereby engages to Messrs. B and C, that if they will credit D a sum not exceeding 500 dollars, in case he shall not pay the same in 12 months from this date, I will pay the same myself;*” in consequence whereof, *B* and *C* sold goods to *D*, to the value of 500 dollars, taking his promissory note for that sum. Immediately after, *B* and *C* sold *D* other goods, for which he gave another note for 375 dollars. Within the year, *D* paid 200 dollars, which was endorsed on the last-mentioned note, and, in three months after the year expired, he paid the balance of that note, and it was cancelled. Soon afterwards, *B* and *C* sold other goods to *D*, taking his promissory note for 379 dollars for the same without any guaranty. 200 dollars were paid on this last note, the balance thereof, and the whole of the note for 500 dollars remaining unpaid. In an action by *B* and *C* against *A*, upon the memorandum aforesaid, it was held that *A* was answerable for the 500 dollars, and interest from the expiration of the year; due notice having been given him, that the debt which he had guarantied was unpaid, and the same having been demanded of him.

THIS was an action of *assumpsit*, founded on a writing, signed by the defendant in the words following, viz. “*The subscriber hereby engages to Messrs. Sturges and Parkman, that if they will credit Elijah Davis, of Bath, a sum not exceeding five hundred dollars, in case he shall not pay the same in twelve months from this date, I will pay the same myself. October 8th, 1804.*”

The action was submitted to the opinion of the Court, on a case

stated by the parties, from which it appears that, in consequence of the said engagement, the plaintiffs immediately after sold and delivered to *Davis* merchandise to the value of 500 dollars, and took from him a promissory note for that sum, dated October 10th, 1804, payable on demand, with interest, after six months from the date. Immediately after the selection of the said merchandise, the plaintiffs sold and delivered to the said *Davis* sundry other goods, to the value of 375 dollars, for which they took his promissory note of the same date, payable in six months, *without any guaranty. In the course of the year 1805, the plaintiffs received of *Davis*, by several instalments, the amount of the last-mentioned note, which was cancelled and delivered up to him on the 14th of December, 1805; at which time, the sum of 111 dollars 58 cents, the balance of that note, together with the interest thereon, was paid; the two first payments thereon, amounting to 200 dollars, having been made within a year from the date of the writing signed by the defendant. On the 14th of October, 1805, notice was given by the plaintiffs to the defendant, that no part of the sum, for which he had undertaken, was paid by *Davis*; and payment was demanded of the defendant. On the 17th of December, 1805, the plaintiffs credited the said *Davis* with other merchandise, to the value of 379 dollars 63 cents, for which he gave his note, without any other security, payable in six months and on the 26th of November, 1806, he paid 200 dollars on account thereof, the residue of the last-mentioned note, and the whole of the first note for 500 dollars, being still due.

Upon these facts, the questions submitted to the Court were, whether the defendant is liable, and, if liable, whether the payments aforesaid, or any part thereof, ought to be applied towards the discharge of his said contract. If the plaintiffs are entitled to recover, the defendant agreed to be defaulted, and that judgment should be rendered against him, for such sum as the Court should award, with costs. If otherwise, the plaintiffs agreed to become nonsuit, and the defendant was to recover his costs.

Thatcher, for the defendant, insisted that the several sums, paid by *Davis* to the plaintiffs, ought, in good faith, to have been applied in discharge of his first note.

The guaranty of the defendant was on an implied condition, that the plaintiffs should not give credit to *Davis* for more than 500 dollars. He had a right to annex this condition to his guaranty, whether it was dictated by prudence, or mere caprice; and the plaintiffs, having accepted it with the condition, were [* 303] bound by it. But there were reasons *for the condition. The plaintiffs, by giving a credit for other

goods, and for a shorter term, were able to apply the proceeds of the credit, for which the defendant was guaranty, in payment of the second credit, while they still held the defendant answerable. Whether, in fact, any injury resulted to the defendant or not, is not material. The plaintiffs did not conform to the condition, and they have lost the benefit of the defendant's security.

Jackson, for the plaintiffs, contended, that the defendant's engagement ought to receive a liberal construction, as a transaction between merchants, who could never have understood it as containing a condition, any further than as it contained a limitation of the amount for which the defendant was willing to become surety for his friend. The guaranty increased the confidence of the plaintiffs in *Davis's* solvency, and induced them to give him a further credit. The same effect would have followed, had the guaranty been addressed to other merchants, and shown to the plaintiffs. It was to be presumed, that the defendant held property of *Davis*, or was indebted to him to the amount, for which he offered to become surety. The guaranty being for a year, it would have been showing a doubt of the defendant's sufficiency, to have applied the moneys received during the year to the first note; but, at any rate, *Davis*, who paid the moneys, had a right to appropriate them to which of the notes he pleased. As to the payments made before the year expired, it was the duty of the plaintiffs, independent of *Davis's* election, to appropriate them to the note which had expired.

The defendant having had reasonable notice of *Davis's* negligence, it became his duty to take measures that the note was paid by *Davis*. He took no such measures for years. It then behoved the plaintiffs to be diligent for themselves, and to collect what money they could from *Davis*, and appropriate it in discharge of their other demands against him.

* The opinion of the Court (*absente Parsons, C. J.*) [* 304] was delivered by

PARKER, J. On the facts agreed in this case, the question submitted to us is, whether the defendant is liable for the whole, or any part of the sum mentioned in the writing, on which the action is founded.

The counsel for the defendant has contended, that the writing signed by the defendant contained a conditional engagement only, and that the condition is of a nature to avoid the contract, if not strictly complied with by the plaintiffs; the true construction of the writing being, that the defendant would be answerable, if the plaintiffs did not trust *Davis* more than five hundred dollars; but that if they exceeded that sum, he was not to be liable.

We cannot adopt this construction, being satisfied that the words, which are supposed to amount to a condition, were intended by the defendant only to limit his responsibility to the sum of five hundred dollars; there being no reason why he should be unwilling that *Davis* should obtain further credit upon his own responsibility — a circumstance which would diminish, rather than increase, the defendant's eventual liability to pay the money.

But the defendant's counsel has more strenuously urged, that the plaintiffs, having voluntarily given *Davis* a credit beyond the sum, for which the defendant became responsible, and having received payments of *Davis* within the term of credit given, pursuant to his guaranty, those payments ought to have been applied to reduce the credit given, in consequence of the defendant's engagement, instead of having been applied in payment of the note, which he had not undertaken to guaranty. (a)

This argument appeared plausible, and had some weight with some of the Court at the hearing; but, upon deliberation, we are all of opinion that it has no solidity. The plaintiffs were not restricted, by any engagement with the defendant; from crediting *Davis* beyond the sum for which they had obtained the [* 305] defendant's guaranty. Finding that *he had obtained that guaranty for five hundred dollars, they might reasonably suppose there would be no hazard in trusting him with a less sum; and they had a right to give such term of credit as they saw fit. This could not prejudice the defendant; for property was put into *Davis's* hands equal to the note taken of him, and, as far as this increase of capital would be of service to him in extending his business, so far would his ability to pay his debts probably increase.

Now, from the terms of the writing signed by the defendant, connected with the tenor of the note for five hundred dollars, and the common practice among merchants to take their notes payable on demand, notwithstanding a credit is intended and understood between the parties; it may reasonably be presumed, that the credit, which was founded on the defendant's guaranty, was twelve months from the date of that guaranty; and that, according to the true contract of the parties, *Davis* was not to be compelled to pay at an earlier day, unless insolvency was likely to happen. When, therefore, he paid to the plaintiffs two sums of money in the sum-

(a) [Quære, if this be not the correct view of the case. The terms of the engagement seem to have been conditional; and there was nothing to indicate an intention to make a continuing guaranty. — See *Melville & Al. vs. Hayden*, 3 Barn. & Ald. 593. — *Borill vs. Turner*, 2 Chitty, 205. — *Nichols vs. Paget*, 1 Cromp. & Mes. 48. — 3 C. & P. 305. — 3 Tyr. 164. — *Kirby & Al. vs. The Duke of Marlborough & Al.* 2 M. & S. 18. — *Hussell & Al. vs. Long*, 2 M. & S. 362. — Ed.]

STURGEON & AL. vs. ROBBINS.

mer of 1805, he had a right to direct the application of them to the discharge, *pro tanto*, of his note for three hundred and seventy-five dollars, that note being then due, and the note for five hundred dollars not being then due, according to the understanding of the parties; and it ought to be presumed that he did so direct. If, however, he did not, the plaintiffs had a right, *if they were not bound*, to apply those payments to the note which was due, instead of applying them to that, the payment of which could not, in conscience, be then enforced.

As to the payments, which were made after the expiration of the first credit, it is to be observed, that these were made after notice to the defendant that he was absolutely bound, in consequence of the non-payment of *Davis*, and after demand on the defendant for the fulfilment of his guaranty. The plaintiffs, being the fair creditors of *Davis*, *without any security, had an [* 306] undoubted right to apply these payments as they saw fit; having given the defendant an opportunity, by their notice to him, of securing himself against any eventual loss. And it is clear, that the plaintiffs had no view of prejudicing the defendant; for they would not have trusted *Davis* so late as the 17th of December, 1805, without any security, had they entertained any doubts of his solvency.

For these reasons, we are all of opinion, that the plaintiffs have maintained their action for the whole sum guarantied by the defendant; for which, together with interest from the 8th of October, 1805, judgment must be rendered after a default of the defendant

Defendant defaulted.

See the case of *Mason vs. Pritchard*, 12 *East*. 227. [This was a very different case. See *Melville vs. Hayden*, 3 *B. & A.* 595.—*Ed.*]

JOSIAH AYERS *versus* ROBERT KNOX.

The penalty imposed by the statute of 1796, c. 85, § 3, does not extend to one who pilots a public vessel of war of the *United States*.

THIS was an action of debt, brought upon the statute of 1796, c. 85, § 3, to recover of the defendant the penalty of fifty dollars, for undertaking, as a pilot, to carry out of the harbor of *Boston* the *United States* frigate *Chesapeake*, he being commissioned as a

pilot for the inward division of pilotage in said harbor, and not for the outward division.

The cause came before the Court upon a statement of facts, in which the parties agreed, that, on the 1st of July, 1809, the plaintiff was a branch pilot for the outward division of pilotage for the harbor of *Boston*, duly commissioned and sworn; and the defendant was a branch pilot for the inward division, duly commissioned and sworn, but not for the outward division; that, on the day aforesaid, the *United States* frigate *Chesapeake* being in the harbor of *Boston*, and on pilotage ground, the defendant, at the request of the commander of the said frigate, who preferred the defendant to any other pilot, undertook to pilot, and did pilot, the said [* 307] frigate out of the said harbor, and *received his fees therefor; the plaintiff, an experienced pilot for the outward division of pilotage, being then ready to perform the said service.

If, upon this statement, the Court should be of opinion that the plaintiff was entitled to recover the penalty demanded in this action, it was agreed that judgment should be rendered for him accordingly; otherwise that he should become nonsuit, and costs adjudged to the defendant.

Prescott, for the plaintiff, relied on the third section of the statute of 1796, c. 85, by which it is enacted that the pilotage of the harbor of *Boston* shall be formed into two divisions, outward and inward. And no person commissioned as a pilot, or his deputy, shall undertake to bring in or carry out of said harbor any vessel drawing nine feet of water, (coasters and fishing vessels excepted,) except in his own particular branch, under penalty of fifty dollars.

By the statute of 1797, c. 13, it is provided that the penalties, incurred by any breach of the act of 1796, c. 85, may be recovered in an action of debt, to be brought in any court proper to try the same, by any person who shall first sue for the recovery thereof, to his own use.

Sullivan, for the defendant, contended that the ships of war of the *United States* are not within the provisions of the act giving this penalty; such ships being always within the exclusive jurisdiction of the general government.

By the constitution of the *United States*, power is given to the congress to provide and maintain a navy, and to make rules for the government and regulation of the naval forces. In pursuance of the powers so granted, the executive department of the navy was established, and the whole direction of the construction, armament, equipment, and employment of vessels of war, as well as of all

other matters connected with the navy establishment of the *United States*, was committed to the secretary of the navy, subject to the orders of the president. (1)

By the act for the better government of the navy of the *United States*, (2) the whole charge of each ship of war is *committed to the commanding officer thereof; [* 308] and by the nineteenth article it is particularly provided, that if any officer shall, through inattention, negligence, or any other fault, suffer any vessel of the navy to be stranded, &c., he shall suffer such punishment as a court martial shall adjudge. The commander must then have a right to use his discretion in the selection of a pilot, for whose ability and conduct he is made responsible; and cannot be bound to commit his ship to the charge of one in whose talents he does not confide.

This reasoning goes to show that the legislature did not contemplate ships of the navy, when prescribing regulations for pilotage. The same may be inferred from several parts of the act itself. The pilots are to be nominated to the governor and council by the marine society of *Boston*; and it is absurd to suppose that the whole navy of the *United States*, when in *Boston* harbor, must be put in charge of persons who derive their authority from a private association, unknown to the general government. These pilots are to give bond to the treasurer of the commonwealth, for the faithful discharge of their duty; but neither the *United States* nor the officers of their navy can derive any benefit from such bond. In the tenth section of the act, pilots are made liable for damage to *cargoes*, arising from their unskillfulness or neglect, which shows that the act relates to merchant vessels only, ships belonging to the navy being prohibited to carry cargoes. By the twelfth section, the hull and appurtenances of all vessels piloted, are made liable for sixty days for the fees of pilotage—a provision which decency forbids to apply to the ships of war of the *United States*.

Prescott, in reply. Neither the constitution nor laws of the *United States* restrain the respective states from regulating the pilotage within their own ports; and as they are most competent to it, it is for the general advantage that it should rest with them.

*The commanders of merchant vessels are equally [* 309] responsible to their employers for negligence, with commanders of public ships; and it is as important to the latter as to the former to have skilful pilots, who shall be responsible for their

(1) *U. S. Laws*, 5 *Cong. c.* 52, vol. 4, page 100.

(2) *U. S. Laws*, 6 *Cong. c.* 33, vol. 4, page 108.

conduct. And in order to have skilful pilots, it is necessary that they be secure of their proper emoluments. The statute applies in terms to all vessels, with certain specific exceptions; but vessels of war are not among the excepted ones.

It is conceded that the provision of the twelfth section of the act cannot apply to public ships. But the question in the present action is not whom the commander of a ship shall employ as a pilot. No charge is brought against him. The penalty demanded is imposed on a citizen, and an officer who derives his authority, and his emoluments, from the laws of the commonwealth; and it is imposed for a breach of those laws which he has voluntarily committed.

The opinion of the Court (*absente Parsons, C. J.*) was afterwards delivered by

PARKER, J. The only question, which arises in this case, is whether the provisions of the statute of 1796, c. 85, are applicable to vessels of war of the *United States*. If they are, then the facts clearly show a violation of those provisions by the defendant, and the penalty ought to be adjudged against him; if they are not, then the defendant was not prohibited from the act of pilotage complained of in this action, and he cannot be charged with the penalty.

When it is considered that before the passing of the statute, on which this action is founded, the power to establish and regulate a navy was fully given by the people to the congress of the *United States*; and that congress has from time to time exercised that authority, without any participation by the state governments; it may well be conceived that the legislature did not contemplate affecting ships of war of the *United States*, when they [*310] passed this statute. * And if they had, in express terms, subjected such ships to regulations respecting pilotage, it may well be doubted whether the commander or officers of any such ship would have been bound by such statute.

But a reasonable construction of the statute itself sufficiently proves, that the legislature intended to limit the operation of its provisions to merchant vessels only, and not to extend them to ships of war. By the eighth section it is enacted that the master of a vessel may refuse the assistance of a pilot, although he should come on board the vessel, and offer to pilot her; but in such case the pilot shall be entitled to half the pilotage fees, and shall have his action of the case therefor against the master. Now, it cannot be supposed that the legislature meant to subject the commander of a frigate to such an action; when, upon common principles of law, such commander would not be personally liable for any service

done to his vessel; the government, and not the agent, being accountable for such service. And by the twelfth section of the statute, a remedy is given to the pilot against the hull, tackle, &c., of any ship he may have piloted, if his fees have not been paid. Now, it would be absurd to suppose that the legislature had the power, or, if it had, would have exercised it, to detain the ships of war of the *United States*, engaged, as they possibly might be, in expeditions of importance to the government.

It is said that these sections may not apply to public ships; and yet that the other provisions of the statute may. But, when a duty is prescribed by statute, and remedies are provided for a breach of it, which remedies cannot be applied to a particular subject, it may fairly be inferred that the subject was not within the view of the legislature, when they exacted the duty.

The inconveniences, which would result from a contrary opinion, are too manifest to need enumeration. There are many reasons why public vessels should not be subjected *to [*311] local laws respecting pilotage. Such vessels are generally furnished, in addition to commanders, with sailing-masters, who are supposed to be skilful navigators, and generally acquainted with the coast and harbors of the *United States*. They therefore may not need pilots; but if they should, as, by the rules and regulations of the navy, great responsibility rests on the commanders of such vessels, they ought to be at liberty to select such persons as they believe most fit to be trusted, without being obliged to submit to the judgment of others.

But it may be further remarked, that the statute, upon which this action is brought, is merely part of a system of pilotage, which was established by the act of 1783, c. 13, this additional act being confined in its operation to the harbor of *Boston* only. Now, the act to which this is in addition, was passed before the adoption of the present constitution of the *United States*; and even if the original act had respect to vessels of war belonging to the then *United States*, it is very clear that the power, vested in congress by the constitution, to establish and regulate the navy, would amount to a repeal of that act; and, of course, it cannot be presumed that the additional act embraced a case which was thus taken out of the jurisdiction of the state.

We are, therefore, for these reasons, all of opinion that the case agreed is not within the purview of the act, on which this action is brought; and that, according to the agreement of the parties, the plaintiff must become nonsuit.

Plaintiff nonsuit.

* DAVID G. EATON AND ANOTHER *versus* SILAS STONE.

Whether in any case the party, who tenders an immaterial issue which is found against him, can have a repleader awarded on his motion : *Quære.*

Where land had been conveyed in payment of a pre-existing debt, which was cancelled at the time of the conveyance, and it was agreed, by deed, that the land should be appraised, as soon as convenient, by three disinterested men, after the manner of land taken on execution, and if the value of the land should be less than the debt cancelled, the grantor would pay the difference in six months from the date of the agreement; after the expiration of the six months, the grantee nominated an appraiser, and the grantor refusing, he was held liable to an action of debt for the penalty of the agreement.

THE declaration in this case was in debt upon an obligation in the penal sum of one thousand dollars.

The condition of the obligation is set forth upon oyer, prayed by the defendant in his bar, and recites that *Phinehas Stone*, one of the obligors, had conveyed to the plaintiffs a house and land, situate in *Weare*, in payment of part, or the whole, of a debt due from the said *Phinehas* to the plaintiffs; and that it being uncertain whether the premises conveyed were equal in value to the debt, which was cancelled when the deed was executed, it was agreed that the said house and land should, as soon as convenient, be appraised by three disinterested men, after the manner of appraisements of land whereon executions may be levied; and that if the value of the premises should fall short of the debt which was cancelled, the obligors should pay the difference in six months from the date of the obligation, and then the penalty is to be saved, if they *shall so pay*, and shall fulfil all the other agreements mentioned in the condition of the bond.

The defendant then avers a readiness at all times to proceed in the appraisement within six months from the execution of the bond, and, also, that the said *Phinehas* did, in fact, choose a suitable person to be an appraiser, and that another suitable person was chosen by *Cook*, the officer mentioned in the condition; and that another person, not a suitable and disinterested one, was chosen by the plaintiffs; and that these appraisers, so appointed, met, but could not agree on the value of the premises; and they then aver a readiness to fulfil the other conditions of the obligation.

The plaintiffs, in their replication, confess the facts alleged in the bar, and endeavor to avoid them by showing that, at another time, after the expiration of six months from the date of the bond, and before the commencement of the suit, they did again choose an appraiser, whom they aver to be disinterested, of which they notified

the said *Phinehas*, and requested him to proceed to choose an appraiser, but *that he refused; and that [*313] they also notified *Cook*, and requested him to choose an appraiser, but that he also refused, so that no appraisement has been made of the said house and land.

The defendant, in his rejoinder, denies that the plaintiffs chose a disinterested person to be an appraiser, and tenders an issue thereon to the country, which was joined by the plaintiffs, and a verdict returned at the last November term, that the appraiser, chosen by the plaintiffs, was disinterested.

The action stood over for judgment to this term; and now *Sullivan*, of counsel for the defendant, moved the Court to award a repleader, on the ground that the issue, which had been tried, was immaterial, and that no judgment could be entered upon it. No appraisement having been made, the penalty of the bond cannot be adjudged forfeited. If the failure had been chargeable to the obligors, the bond would have become single. But they did all in their power to do it within the time limited; and after that time had expired, they were under no obligation to do any thing more. If the plaintiffs have made a contract which can never be executed, it is their own folly. If the defendants have performed all they were bound to, they are discharged from their obligation. (1)

If the Court are at a loss what judgment to render on the verdict, they will order a repleader for their own sakes. (2)

Dutton, for the plaintiffs, contended that there was enough apparent on the pleadings to entitle them to judgment. If, until an appraisement shall actually have been made, the plaintiffs can have no action on the bond, the bond is perfectly idle; for the obligors can forever prevent an appraisement by refusing to nominate an appraiser. The plaintiffs have done all in their power to do towards the equitable adjustment contemplated by the parties to the bond; and the defendant, by refusing to appoint an appraiser, *has prevented the adjustment, and ought now to pay [*314] to the plaintiffs what is, in good conscience, due to them. (3)

But this issue is not immaterial. If the jury had found that the appraiser nominated by the plaintiffs was not a disinterested person, the plaintiffs must have lost their cause; for it would have been chargeable to them that no appraisement was made.

If, however, the issue is immaterial, it is not for the party, who

(1) 6 D. & E. 719. *Worsley vs. Wood*.

(2) 2 Lilly's Abr. 460. — 2 Salk. 579. — 1 Keb. 89. — 1 L. Raym. 133. — 2 Str. 994, 847.

(3) *Willes's Rep.* 532

tendered the issue against whom it is found, to move for a repleader. The Court will not grant it upon his motion, for he committed the first fault. (4)

PARKER, J. This case comes before the Court upon a motion that a repleader be ordered, on the ground that the issue joined by the parties, and tried by the jury, was wholly immaterial, so that nothing decisive of the merits of the case has been found, nor any thing upon which the Court can render judgment.

Generally a repleader will be ordered before or after verdict, when the Court shall be satisfied that the fact put in issue is irrelevant to the merits of the case. (a) But it is at least doubtful, whether, in any case, the party, who tenders an immaterial issue, should it be found against him, can have the benefit of a repleader. And this upon the just principle, that the party who commits the fault shall not avail himself of that fault, to cause a prejudice or delay to the other party. To this effect speaks Justice *Buller*, in the case of *Webster vs. Bannister*, (5) and the other judges do not deny the doctrine. (b)

But still, if the issue shall be found to be clearly immaterial, although a repleader may not be granted, it may be necessary for the Court to look into the whole of the pleadings, to see whether a judgment can be rendered; for it may be, that although the defendant in this case has no right to a repleader, yet that the pleadings on the part of the plaintiff do not show any thing on which he can be entitled to judgment. (c)

[* 315] * It is, therefore, necessary to inquire into the pleadings. (*Here the judge recited the substance of the pleadings, as above stated, and proceeded.*)

In order to determine this cause, we are necessarily carried back to the condition of the obligation declared upon; for there only can we ascertain the contract, which was made by the defendant. It is apparent that the defendant intended to bind himself; that the land, with which the debt due to the plaintiffs had been paid, should be appraised; and that, when appraised, he would pay whatever

(4) *Doug.* 395. — 1 *L. Raym.* 170.

(5) *Doug.* 396.

(a) [No rule is better established than this, that the Court will not grant a repleader, except where complete justice cannot be answered without it. — *Per Tindall, C. J.*, 9 *Ringh.* 543, *Goodburne vs. Bowman*. — Ed.]

(b) [And see 1 *Chitty's Pleadings*, 6th London edition, 656, note (f). — 2 *Saund.* 5th London edition, 319, c. — *Kempe vs. Crews*, 1 *L. Raym.* 170. — *Staples vs. Hayden*, 2 *L. Raym.* 922. — 2 *Salk.* 579. — 6 *Mod.* 1. — *Taylor vs. Whitehead*, 2 *Dougl.* 747. — *Tidd, Pr.* 9th edition, 921. — *Goodburne vs. Bowman*, 9 *Bingh.* 532. — *Tryon vs. Carter*, 2 *Str.* 954. — Ed.]

(c) [After verdict, upon an immaterial issue, if a repleader be not awarded, there must be judgment *non obstante veredicto*, unless judgment be arrested. — Ed.]

difference there might be between that value and the amount of the debt so paid. The defendant contends, that he was bound to abide the award only in case it should be made within six months from the date of the bond ; and that if no appraisement should be made within six months, the obligation was void.

This construction would be manifestly unjust ; and, as I apprehend, contrary to the intent of the parties ; for, indeed, it would deprive the plaintiff of all benefit of his obligation, in case of a delay, occasioned either by design of the obligor, or the convenience of the appraisers.

The condition, after reciting the grounds of the contract, states that it is agreed, that the land and house shall, as soon as conveniently may be done, be appraised, &c. This, undoubtedly, is equal to a covenant, that the appraisement shall take place, or at least that it shall not be prevented by a refusal on the part of the obligors to appoint an appraiser ; and if this is a stipulation on the part of the defendant, there is no reason why an abortive attempt to procure an appraisement should discharge him from it, and leave no remedy whatever to the plaintiffs, for the part of their debt which is lost, if the value of the house and land is less than the amount of the debt.

The only ground, upon which it can be contended that the obligation of the defendant to cause or suffer an appraisement expired in six months, is, that, by a subsequent stipulation, the defendant engages to pay such a sum as may be awarded, within six months from the date of the bond.

* This is a stipulation distinct from, and independent [* 316] of the agreement to appraise, and ought not to limit the latter, contrary to the real intent of the contract and the justice of the case. Undoubtedly it shows that the parties expected an appraisement within six months ; but it cannot be a condition on which the stipulation to make an appraisement was to subsist ; for we find the obligors in this instrument saying, with a reference to this payment, if they do so, and also fulfil the other agreements herein contained, then their bond is to be void. There are but two agreements mentioned in the condition ; one, that the land and house shall be appraised ; the other, that when they are appraised, the money shall be paid in six months from the date. The first agreement may subsist, although the second has now become impossible to be performed.

If, then, there is an absolute stipulation, amounting to a covenant, that the land shall be appraised as soon as it can be conveniently ; a second stipulation, *viz.* that the money shall be paid within six months from the date of the bond, ought to be con-

strued to mean that payment shall so be made, if an appraisement shall be made within that time. But it would be manifestly unjust to consider the agreement to appraise as void after six months; there being, in that case, no remedy left to the obligees, if the value of the land and house should fall far short, as it might, of the debt for which it was intended to be received in payment only in case it was found equal in value to the debt. And, indeed, there was no other reason for the bond, than an expectation of the parties that the house and land were not sufficient in value.

On the ground, then, that there was an absolute undertaking to have an appraisement within a reasonable time, and that this time was not limited to six months, *Phineas Stone*, one of the obligors, was bound not to refuse to appoint an appraiser, if he should be called on by the obligees to do it within a reasonable time. The replication states, that the plaintiffs did, on the 7th of [* 317] September, 1807, * appoint a suitable disinterested person to appraise, and thereof did notify the obligees, who refused to appoint an appraiser on their part. The rejoinder does not deny that this was within a reasonable time, but denies that the person so appointed was disinterested; and the issue, being joined on this fact, is found for the plaintiffs.

In this view of the case, the issue is material, for it decides the fact on which the obligation of the defendant to proceed in the appraisement rested; which not having fulfilled, as appears by his admission in the pleadings, he has broken the condition of his obligation, and judgment at law ought, therefore, to be given against him upon the verdict; and he may be admitted, pursuant to the statute, to a hearing in chancery.

SEWALL, J., of the same opinion.

Note. After the *justices* present, who had heard the argument, had delivered their opinions, *Parker, J.*, stated that *Sedgwick, J.*, did not concur with them. The *chief justice*, being present in Court, observed, that from a perusal of the pleadings, without having been in Court at the argument, he was strongly inclined to the opinion which had been pronounced by his brother *Parker*. (a)

Judgment on the verdict.

a) [Vide *Goodburns vs. Bowman*, 9 Bingh. 352. — Ed.]

CHARLES PAINE *versus* GEORGE ULMER.

An action against a sheriff for the default of his deputy, in not returning an execution, survives to the administrator of the judgment creditor.

THIS was an action of the case against the defendant, as sheriff of the county of *Hancock*, for the default of his deputy, in not returning an execution, which the plaintiff had committed to him.

Before the last November term, the plaintiff had died, and *Charles Cushing*, jun. Esq., to whom administration of his estate had been committed, moved at that term to be admitted to prosecute the action. He was accordingly admitted, *de bene esse*, by *Parker*, J., who sat in the trials of that term. A verdict was found for the plaintiff, subject to the opinion of the Court on the right of the administrator to prosecute the suit.

* The cause stood over to this term; and now, *Aylwin*, [* 318] of counsel for the plaintiff, contended that this action survived to the administrator, by the rules which had hitherto been applied in the exposition of the statute of 4 *Edw.* 3, c. 7, *de bonis asportatis*. It has been repeatedly decided, that all wrongs done to the estate of the testator, come within the equity of this statute, and that for them an executor may bring his action. Thus an action of debt lies by an executor against a jailer for an escape on execution in the testator's lifetime; (1) though it has been doubted whether it lay for an escape of mesne process. (2) It has also been adjudged, that an executor might bring a writ of *Ravishment of ward*, *Ejectione firmæ*, and *Quare impedit*. (3)

If these cases are to be classed among those which are considered as wrongs to the estate of the testator or intestate, there can be no doubt that the case at bar falls within the same class; as it appears that the original judgment on which the execution issued, was for a debt due to the intestate, which has been lost by the non-feasance of the deputy of the defendant.

The statute *de bonis asportatis* has always received a liberal construction in favor of executors, according to Lord Chief Justice *Holt*, in the case of *Williams vs. Grey*, (4) which case virtually decides that this action survives.

S. K. Williams for the defendant. The case of *Williams vs.*

(1) *Platt's case*, *Plowd.* 34. — *Fitz. N. B.* 121, a.

(2) *Latch.* 167, *Lemason vs Dixon* — 1 *Roll. Abr. Tit. Exr. tutor.* P. pl. 2. — *Prph* 189.

(3) *Vent.* 30.

(4) 1 *L. Raym.* 41.

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Grey decides only that, where goods were taken by virtue of a *fieri facias* to the amount of £100, and the officer returned that he had levied goods but to half that value, an action survived to the executor for this false return. And this case was evidently within the equity of the statute *de bonis asportatis*. For the goods, when taken by the officer, became *quasi* the property of the creditor.

It is not contended, that debt or case may not be sustained by an executor for an escape committed in the lifetime of the creditor.

For the body of a debtor, while in execution, is in the [*319] nature of a pledge for the payment of * the debt. To deprive the creditor of this pledge, by suffering an escape, is doing an injury to his estate, which an equitable construction of the statute may well remedy.

In the case at bar, neither the property of the debtor nor his body were taken on the execution ; nor is there any allegation in the declaration, that either could have been taken, or that the officer assumed, and took upon himself to serve the execution. No authorities have been produced to the Court, and it may be hence inferred that none can be found, where an action for a mere *non-feasance* has been held to survive to the executor.

The administrator in this case is not without his remedy. The judgment against the original debtor is still in full force, and an action thereon will restore the plaintiff to his right, and furnish him with the most honest remedy.

The Court, without hesitation, determined that the action in this case survived, admitted the administrator to prosecute, and ordered judgment to be entered for him on the verdict.

HANSON KELLEY versus ISRAEL MUNSON.

A sale by a factor creates a contract between the owner and the buyer ; and if on credit, the buyer may not pay the factor after notice from the owner, except where the factor sells in his own name, and is responsible to the owner for the price, whether collected or not ; or where he sells to his own creditor, there being mutual dealings between them.

This was an action of *assumpsit*, brought to recover the proceeds of eighteen hogsheads of molasses, alleged to have been shipped by the plaintiff at *St. Vincents*, and consigned to the defendant for

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sale. There was also a count for 1000 dollars, money had and received by the defendant to the plaintiff's use.

Upon the trial of the action before *Parker, J.*, at the last November term in this county, the plaintiff offered certain evidence to prove that in November, 1807, one *Elias Williams* was at *Wilmington*, in *North Carolina*, (where the plaintiff resides,) in the schooner *Fair Trader*, of which he was master, and one *Moses Wallis*, of *Salem*, was owner; that the plaintiff put on board said vessel a quantity of lumber, to be carried to *Barbadoes*, and delivered to his consignee there, on payment of certain freight, stipulated in the bills of lading.

* The vessel did not arrive at *Barbadoes*, but was [* 320] driven by contrary winds to *St. Vincents*, as stated by *Williams*, the master. At this latter place, he sold the whole cargo to one *Dunham*, receiving part of his payment therefor in the produce of the island, with which he sailed in January, 1808; and after stopping at *Havanna*, arrived at *Charleston, South Carolina*, in April following. The plaintiff went there, and attempted to get from *Williams* the proceeds of said cargo, or compensation therefor, but could obtain nothing. *Williams* left the remaining sum due for the said cargo in *Dunham's* hands, at *St. Vincents*, with orders to ship it in molasses to the defendant, as soon as the new crops should come in, and the price become lower. It appeared that the molasses in question was afterwards shipped, in pursuance of this order.

The plaintiff also produced a deposition of said *Williams*, taken since the commencement of this action, in which he testifies, "that, on or about the twentieth day of December, 1807, he sailed from *Wilmington*, on board the lugger *Fair Trader*, bound for the *West Indies*; the said lugger having on board, on freight and consignment, a cargo of lumber, about ninety thousand; that, in January following, he sold the said cargo of lumber at *St. Vincents*, to *W. Dunham*, for and on account of the plaintiff, amounting to upwards of 2000 dollars, the proceeds of which he, *Williams*, ordered to be shipped to *Boston*, to the care of the defendant, to whom he gave orders to sell the same, and remit the money to him, that he might settle with the plaintiff, the freight of said cargo having been paid to him, *Williams*, at *St. Vincents*; and that he, *Williams*, had good reason to believe, and verily did believe, that in consequence of said orders, two different shipments had been made to the care of the defendant, to be remitted as aforesaid, say, in all, thirty-five hogsheads of molasses, all of which was the property of the plaintiff, as remittance in payment for the said lumber.

* Before the commencement of this action, the said [* 321] *Williams* drew an order on the defendant, in favor of

the plaintiff, for the net proceeds of said molasses; but, before the order was presented, the defendant had been summoned as the trustee of said *Williams*, at the suit of said *Wallis*. This action was then defended by *Wallis*, in the name of *Munson*, who had no interest therein, but was merely a trustee for whoever might be the right owner.

Williams died in February, 1809, since which his administrators claim the said proceeds for the benefit of his creditors, it being understood that his estate is insolvent.

The defendant produced the letter of *Williams*, advising him of the intended shipment of the molasses; also the invoice and bill of lading, in which it is expressed to be shipped on the account and risk of *Williams*. The defendant also produced other letters from the said *Williams* to said *Wallis*, written at *St. Vincents*, tending to prove that he had in his possession there certain effects of said *Wallis*, arising from the freight of said cargo of lumber, or otherwise; and it did not appear that any act was done by *Williams*, at *St. Vincents*, to separate the effects of *Wallis* and the plaintiff, or to ascertain whether any part, or how much of the proceeds of the plaintiff's lumber, was carried away by *Williams* from *St. Vincents*; nor whether any, or how much, was left in the hands of *Dunham*, at *St. Vincents*, as before mentioned.

Upon this evidence it was contended for the defendant, at the trial, that the plaintiff had not proved any right to these specific goods, and of course could not recover in this action, even if the jury believed that they were purchased in *St. Vincents* with the proceeds of the lumber, which was shipped by the plaintiff.

The judge directed the jury, that if they believed, from the evidence, that the molasses, which was shipped by *Dunham* to *Munson*, was purchased with the proceeds of the cargo shipped by the plaintiff at *Wilmington*, and sold on his account

[* 322] by *Williams*, as testified by him in his deposition; * then it came to *Munson*, as the agent or factor of the plaintiff, through the medium of *Dunham* and *Williams*; and that the plaintiff had a right to draw it out of the hands of *Munson*, notwithstanding *Williams*, by his letter of advice and bill of lading, shipped it on his own account and risk; that *Munson* might, before notice from the plaintiff, have safely paid it over to *Williams*; but as the money was still in *Munson's* hands, if they believed the deposition of *Williams*, the property of the plaintiff in the molasses was clearly proved, and he now had an undoubted right to recover the proceeds, deducting the expenses, commissions, &c.

The jury found a verdict accordingly, in favor of the plaintiff, upon which judgment was to be rendered with additional interest

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unless the Court should be of opinion that the direction of the judge was wrong in law; in which case the verdict was to be set aside, and the plaintiff to become nonsuit.

Selfridge and *Whiting* argued for the plaintiff, and *Jackson* for the defendant.

SEWALL, J., delivered the opinion of the Court.

(After stating the facts at the trial from the judge's report, including his direction to the jury, his honor proceeded as follows.)

Was the direction given to the jury at the trial correct in point of law upon this evidence? is the question to be considered.

Upon the supposition relied on for the defendant, that *Williams* conducted fraudulently and tortiously in going to *St. Vincents*, in selling the plaintiff's cargo there, and in directing the proceeds remitted to *Boston* in his own name; and, in short, that in the transaction proved, independently of *Williams's* own testimony, he was not the agent therein of the plaintiff, either by contract or by necessity; yet as he had been made to some purposes the agent of the plaintiff, and the subject of the demand, now in question, is ascertained to be the proceeds of the plaintiff's cargo

*sold at *St. Vincents*, we see no just reason for consid- [* 323]
ering the property in the hands of the defendant, the proceeds of a payment for that cargo, as acquired to *Williams* by a breach of trust and a fraudulent course of conduct. *Dunham* and *Munson*, the intermediate agents of *Williams*, so far as they had proceeded under his directions, or, if that had happened, had given any credit to *Williams* upon the score of this property, without notice of the claims of the present plaintiff, would have been considered as indemnified by the color of right in *Williams*, while possessing and disposing of it in the usual course of business.

But, between *Williams* and the present plaintiff, (and as a question of property it is altogether between them,) it would be unjust, and it is not required by any general principles important to mercantile credit and confidence, that the fraud of *Williams*, according to the present supposition, should be allowed a further success to his own emolument. Nor would an acquisition, effected in the manner supposed, be rendered more just or legal by an appropriation of it to the general creditors of the guilty party, or to discharge any debt of his, where the credit had not been obtained by his possession and apparent ownership of the property in question.

It is true that *Williams*, supposing his conduct fraudulent and tortious, incurred himself every risk attached to the sale at *St. Vincents*, and the remittance to the defendant; but the transaction being without the plaintiff's consent, and by the supposition, without any authority from him, this circumstance of *Williams's* risk will not

operate to deprive the plaintiff of his right against his trustee. For the sake of a remedy, where property has been wrongfully embezzled by an agent, or obtained and disposed of by a person acting without title, or under a void authority, the party injured may dispense with the wrong, may waive the tort, as it is expressed, may adopt the agency, becoming, in that case, liable to all the consequences of adopting it, may suppose the transaction to [* 324] have been for his account * and to his use, and then those who hold, or are indebted for the proceeds, hold for the account of the right owner as a principal, and are indebted to him. (1)

Upon the other supposition made, and depending wholly upon the credit to be given to *Williams's* testimony, contradictory as it is, in some respects, to the presumptive evidence arising from the circumstances of his conduct, that he acted by necessity, with fair intentions, and for the interest of his employer, in selling at *St. Vincents*; then the transaction has been throughout for the account and at the risk of the plaintiff, independently of his consent, and notwithstanding *Williams* used his own name, and was not, in every disposition of the plaintiff's cargo, or the proceeds of it, careful to distinguish, and to give notice who was the general owner, and that he himself was but a factor for another.

The general rule is, that a factor's sale creates a contract between the owner and the buyer; and where a factor having sold upon credit, the owner or principal gives notice of his interest and claim to the buyer before payment, and requires him not to pay the factor, the buyer will not be justified in afterwards paying the factor. And this rule applies whether the factor has or has not named his principal at the time of the sale. (2)

There are exceptions to this rule; as where the factor sells in his own name, being himself responsible for the price of the goods sold, whether collected or not; (a) or where he sells them to his own creditor, where there are mutual dealings. The principal cannot, in those cases, interfere, to the prejudice of the party dealing with the factor, without any knowledge of his agency; and only the balance, if any be due to the factor, may be reclaimed by the principal.

These exceptions are not applicable to the case at bar, or rather confirm the application of the general rule; for *Williams* never was

(1) 2 L. Raym. 1216, *Lamine vs. Dorrell*. — 2 Lev. 245. — Bull. N. P. 133.

(2) Bull. N. P. 130.

(a) [The principal may always maintain an action, and is generally liable to be sued when discovered. — *Thomson vs. Davenport*, 9 B. & C. 78. — 4 M. & R. 110. — *Patterson vs. Gaudesque*, 13 East. 62. — *Cochran vs. Irlam*, 2 M. & S. 301, n. — Ed.]

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personally responsible, unless he became so by his own wrong. This his principal may dispense with, if he pleases; and the intermediate agents have *indemnified themselves, [* 325] or are not liable to any loss by this decision.

Upon the whole, it is the opinion of the Court, that the direction upon the evidence given at the trial was correct, and that judgment be entered according to the verdict.

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GEORGE BAYLIES AND ANOTHER *versus* EDWARD FETTY-
PLACE AND ANOTHER.

Evidence of a promise to deliver debentures, will not support an action upon a promise to pay money.

In all cases of *assumpsit*, whatever shows that a complete satisfaction has been received by the plaintiff before the trial, may be given in evidence under the general issue.

The laws of the *United States*, laying an embargo for an unlimited time, and afterwards repealed, did not extinguish a promise to deliver debentures, but operated a suspension only during the continuance of those laws.

THE declaration, which was in case, contained three counts. The first was a general *indebitatus assumpsit* for sugar sold and delivered. The second count alleged that the defendants, at *Boston*, on the 9th day of December, 1807, in consideration that the plaintiffs had, on that day, sold and delivered to them ninety-two boxes of white sugar, and ninety-eight boxes of brown sugar, at their special request, promised to pay them therefor the sum of 2965 dollars 34½ cents in three months, and another sum of 2965 dollars 34½ cents in four months, and to deliver to them, within a reasonable time, certain certificates of debenture of the *United States*, so called, of the value of 1929 dollars 68 cents. The third count was similar to the second, except that it alleged the promise, as to the last-mentioned sum of 1929 dollars 68 cents, to be to pay that sum in money in four months.

The defendants pleaded the general issue to the first and third counts, and to the promises to pay money, alleged in the second count, which was joined by the plaintiff.

And as to the promise to deliver the certificates of debenture, they pleaded in bar, that the certificates, mentioned in the declaration, were to be granted and issued by the officers of the customs on the exportation of the same sugars, mentioned in the declara-

tion, from the *United States*, and could not be obtained, unless the same should be exported; that within a reasonable time for obtaining and delivering the said certificates, after the said 9th [* 326] of December, * *viz.* on the 22d day of the same December, the defendants did all things necessary and proper on their part to be done, in order to export the same sugar, and to procure such certificates to be issued; and that on the same day a certain act or law was passed and enacted by the congress of the *United States*, entitled "An act laying an embargo on all ships and vessels in the ports and harbors of the *United States*;" by means of which act, the same having continued unrepealed, and in full force at the time of the commencement of this action, the defendants were then, and continually afterwards, until the commencement of this action, prevented and hindered from exporting the said sugar, and from obtaining the said certificates of debenture, and thus, by force of the said law, and without any act or default of themselves, they have been and yet are wholly unable to deliver the said certificates of debenture to the plaintiffs; and this, &c.; wherefore, &c.

To this plea in bar the plaintiffs replied, that long after the passing of the said act, and notice thereof had by the defendants, *viz.* on the 31st day of the same December, the defendants demanded of the plaintiffs the delivery of the said sugar, and the plaintiffs, from that day, until the 16th day of January following, did deliver the same, in virtue of the sale thereof made to them as aforesaid. And this, &c.; wherefore, &c.

To this replication the defendants demurred generally, and the plaintiffs joined in demurrer.

The action proceeded to trial before *Parker, J.*, on the issue of fact joined; and the jury returned their verdict, that the defendants never promised, &c., subject to the opinion of the Court, whether, upon the evidence produced in the case, the action, as it respects the third count, could be maintained.

The plaintiffs, to maintain the issue on their part, proved that the sugars mentioned in the count were delivered by them [* 372] to the order of the defendants, between the first and *sixteenth days of January, 1808; and there was no dispute about the price, which was according to the sums mentioned in the count.

The defendants read in evidence a receipt, signed by the clerk of the plaintiffs, for the first sum mentioned in the declaration, dated March 15th, 1808; and also another receipt, signed by the same person, dated April 14th, 1808, for the second sum mentioned, which last receipt was in the following words, *viz.* "Received of

Fettyplace & Watson twenty-nine hundred and sixty-five dollars 19 cents, being the balance of the within bill, exclusive of the amount of the debentures." And it was agreed that the last sum mentioned in the declaration was to have been paid in debentures; which were not paid within the time agreed between the parties, but had been paid since the commencement of this action.

The judge directed a verdict for the defendants, on the ground that an express contract was proved, different from that alleged in the declaration.

The cause was argued at the last March term, by *Otis* and *Welsh* for the plaintiffs, and *Dexter* and *Jackson* for the defendants; the counsel confining themselves principally to the question arising under the demurrer.

For the defendants, in support of the demurrer, it was contended, that the promise, being to deliver the debentures within a reasonable time, was not broken when the action was commenced. By reasonable time, in this case, must be understood a time in which a reasonable man would have demanded the debentures; but certainly no reasonable man would have demanded them while, by an express law of the government, the defendants were hindered from obtaining them. And as soon as the restraint of the law was taken off, it appears from the judge's report, that they were obtained and delivered to the plaintiffs. No principle of law is better known and established than that where one makes a contract to do a possible and lawful act at a future time, and before the time, it becomes *impossible, by the act of God or the law, the [* 328] obligation is saved. (1)

Put the case, that instead of debentures, the defendants had contracted to transfer a quantity of the *United States'* stocks on a day certain, and that before the day a statute passes prohibiting all transfers of such stocks. The utmost the defendants could be liable for in such a case, would be the value of the stocks, or the consideration paid for them, in a proper action. Such an action the defendants are ready to meet, and in defence of it would prove that they had delivered the debentures as soon as the law permitted them; and leave it to the plaintiffs to show what damages they were entitled to.

As to the demand and delivery of the sugars, which are alleged in the replication, it neither aids the count nor avoids the bar. The defendants were bound to take the sugars, and the plaintiffs had a right to the cash payments as they should fall due. This was the whole value of the sugars, unless exported; and all that the defend-

ants promised to pay themselves. The *United States* were to pay the debentures, if they saw fit. The defendants were to furnish them when they should be issued. (2)

For the plaintiffs, it was argued that, in this case, a reasonable time must have intended so long a time as it would require to lade the goods on shipboard, upon which the debentures were to arise. Here the plaintiffs waited more than six months before commencing their action. But the promise was not to deliver the identical debentures, which might be issued on the exportation of these particular sugars. The defendants might have procured other debentures, to the amount required, which are an article always at market.

Though the general principle cannot be denied, that the act of the law shall excuse the non-performance of a contract, yet the law must be understood to be such a one as, under a free constitution, is within the rightful authority of the government to enact, which it was strongly contended that the act imposing the embargo was not.

[* 329] * But, admitting the authority of congress to pass the law, the defendants, by their demanding the delivery of the sugars after the law was known, must be understood to have waived the excuse, which it might have furnished them for rescinding the contract, and to have undertaken, in case they could not obtain the debentures, to pay the value of them in money.

The cause stood over to this term for advisement ; and now the following opinions were delivered : —

SEWALL, J. Two questions have arisen in this cause. 1. Whether the evidence offered at the trial maintained the allegations of the third count, upon which a verdict has been found for the defendant ; and, 2. Whether the plea in bar to the second count is a sufficient justification, either by excusing the defendants from the performance of their promise, or to the effect of showing that there had been no breach of it when this action was brought.

In the third count, upon which the verdict has been found, the plaintiffs state a sale of sugars to the defendants, and a delivery of them on the 9th of December, 1807, and a promise of the defendants to pay therefor in money, at three instalments ; the two last instalments at the expiration of four months from the delivery of the sugars. At the trial of the general issue, joined upon this count, the evidence, as reported, was a sale of sugars and an agree-

(2) 1 *Bos. & Pul. New. Rep.* 330, *Brooke & Al. vs. White.* — 3 *Bos. & Pul.* 582, *Dutton vs. Solomonson.* — *Ibid.* 295, *Bright & Al. vs. Page.* — 8 *D. & E.* 259, *Hadley vs. Clarke & Al.*

ment to pay therefor two sums of money at two instalments, and a third sum in debentures.

The variance between the count to be proved and the evidence is manifest; the balance due on the sale of the sugars was payable in debentures, and not in money. Perhaps the third count, and certainly a general *indebitatus assumpsit* for the balance in controversy between these parties might have been maintained by proving a sale of sugars for money, and an agreement that a part of the sum should be paid and received in debentures, if delivered within four months, supposing the time elapsed, and the debentures not delivered, when the action was brought. (3)

* But the third count alleges a special promise of money [* 330] payable in three instalments, which is to be proved, if not precisely, yet in every material circumstance, as it is alleged. This seems to be the doctrine in the case cited in the argument of *Brooke & Al. vs. White*, and in many other decisions, which might be cited to the same purpose. In the actual state of the evidence, therefore, proving a promise of debentures for the third instalment, the verdict was, I think, rightly taken for the defendants; they had not made the promise alleged in the third count.

In the second count, the promise of the defendant is alleged as in the third, excepting that the balance supposed to be due is stated, as arising upon a promise to deliver to the plaintiffs, *within a reasonable time*, certain certificates of *debenture* of the *United States* of the value of 1929 dollars 68 cents. Had there been, in this respect, a breach of the defendant's promise, when this action was commenced?

The plea in bar is, substantially, that the said certificates of debenture were certificates to be granted at the custom-house of the *United States* on the exportation of the sugars, and not to be obtained until exportation, for which a reasonable time had been allowed; and that within such reasonable time an act of the congress of the *United States*, continuing in force when this action was commenced, had prohibited and prevented all such exportation; and so, without any default, the defendants had been, and yet are, unable to deliver the said debentures.

The replication contains no material allegation in answer to this defence. The acceptance by the defendants, subsequent to the embargo, of the sugars purchased, and in legal contemplation delivered at the time of the sale, is wholly immaterial. The sale and *delivery* previous to the embargo, are averred in the third count as well as the second.

The question then is, whether the act laying the embargo operated in any manner to excuse the defendants from [* 331] * the performance of their promise to deliver a certain amount of debentures, as a part of the price of their purchase of sugars; or to excuse them for not procuring and delivering the debentures, while that act continued in force.

After examining the decisions cited in the argument, and other authorities upon the general question, I am not satisfied that the embargo act had the operation contended for, of dissolving a contract for delivery of debentures; or, as I understand the argument, of excusing the party liable upon such promise entirely, both from the obligation of procuring the debentures, and of rendering an equivalent in money. An embargo, considered as a temporary suspension of commerce, does not operate a dissolution of any mercantile contract. (4) (b)

If the embargo enacted by congress in 1807, was to be construed a perpetual prohibition of commerce, as for a time it was apprehended to be, I am not satisfied that the defendants would have been, in that event, entirely discharged from their promise. It is true that the law will not compel impossibilities; so neither will it do any man an injury; that is, inflict upon an innocent party a positive loss, accompanied with a privation of right.

The distinction cited from *Aleyn's* reports, by Justice *Lawrence*, in the case of *Hadley vs. Clarke & Al.*, would apply, I think, in the case at bar, supposing the embargo to have been a perpetual prohibition of commerce. "Where the law creates a duty or charge, and the party is disabled to perform it, without any default in him, and he hath no remedy over, there the law will excuse him; but when the party, by his own contract, creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity; because he might have provided against it by his contract."

It may be further observed, that, in the case at bar, there was nothing unlawful in the contract itself, originally; nor was it made unlawful by the embargo; and, although the [* 332] * delivery of the specific debentures, to be obtained on the exportation of the sugars, became, by that act, impracticable, yet this did not disable the defendants from paying, or the plaintiffs from recovering, the discount allowed upon the price of the sugars, or a reasonable indemnification and equivalent for the debentures, engaged as the consideration of that discount.

But, considering the embargo act to have been, as it happily

(4) *Abbott*, 408
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(b) [See *vide Platt on Cas* 587, 588. -- Ed.]

proved in the event to be, a temporary suspension of exportation, and especially connecting with it the supplementary act of congress, passed a few days after the first act, and in the same session, — which provides that the time during which the embargo act shall continue in force, shall not be computed as a part of the term in which merchandise imported must be exported, in order to be entitled to a drawback of duties, — I am of the opinion, that there had been no breach of the promise of debentures, when this action was commenced.

The argument, by which this opinion is deduced, may be thus stated. That contract has, in the subject matter of it, a direct reference to the revenue laws of the *United States*; and the promise of debentures must be intended to be, and by the pleadings it is confessed to be, a promise of the specific debentures, to accrue on the exportation of the sugars sold and delivered by the plaintiffs; and, by a necessary construction, the defendants were entitled to the same term or period for exporting, as the plaintiffs themselves would have had; the contract being, in this respect, free from any express or implied restriction. That period, as then prescribed by the revenue laws of the *United States*, had not elapsed, when the embargo law, prohibiting all exportation, took effect. Construed as a temporary suspension of foreign commerce, the embargo act did not operate a dissolution of the contract between these parties; but in suspending the right of the defendants to export their sugars, it necessarily suspended the right of the plaintiffs to demand debentures due only on exportation; or not * due [* 333] while the right to export with a title to debentures continued; that being the reasonable time allowed to the defendants, and no exportation, or forfeiture of the right to export, having taken place. And whatever may be said of the embargo act in a political view, it must be construed, I think, a temporary suspension only, as applied to the subject matter of this contract; especially after the supplementary act mentioned was enacted, which extended the privilege of exporting with a title to debentures, or a drawback of duties. This privilege having been transferred, with the sugars, from the plaintiffs to the defendants, without any restriction upon the exercise of it; the time originally prescribed, any suspension of exportation, or extension of the time allowed for exporting, must be considered as within the intentions of the parties; so far at least as they had referred themselves to the revenue laws, ultimately resting on the control to be exercised, and the regulations prescribed and to be prescribed by the legislature of the *United States*.

The legal consequences to these parties of an utter privation, of

loss of the privilege of exporting, or of the title to the debentures engaged to the plaintiffs, we are not, on this occasion, called upon to determine. On that question, I incline, however, to the opinion already intimated; that in the event supposed, however involuntary the consequent breach of promise on the part of the defendants would have been, their liability to the plaintiffs for an equivalent of the debentures, if not for the whole discount allowed on the sales, would have continued, notwithstanding the legal impossibility of a specific performance of their promise.

At the time of commencing this action, the embargo act, connected in construction, as it must be, with the supplementary act, applicable to the subject matter of the contract in question, was not to be considered as an abolition of foreign commerce. And, notwithstanding these extraordinary laws, the defendants retained the right of exporting their sugars, with a title to the de-
[* 334] bentures engaged to the plaintiffs. * And the mere suspension of the exercise of this right operated equally upon the plaintiffs and the defendants; was created by laws, to which both were parties; and formed a part of that system of regulation, to which they had referred themselves, in the implied intentions, if not in the express letter of their contract.

This action was therefore commenced, when there had been no breach of the defendant's promise, as it is explained in their plea in bar; and judgment ought, in my opinion, to be entered for the defendants, as well upon the demurrer as upon the verdict; the replication being immaterial and insufficient, and the plea in bar being a sufficient answer to the second count.

SEDGWICK, J. There are two general questions in this case, one arising on the motion of the plaintiffs for a new trial, and the other on the pleadings.

The trial was had upon the third count, in which the plaintiffs allege, that the defendants, in consideration of certain sugars sold and delivered to them by the plaintiffs, promised to pay therefor three several sums of money at different periods. On the general issue pleaded, it was proved that the defendants had paid the two first-mentioned sums of money. There was no question as to the amount, which was to be paid for the sugars; but it was agreed, that the last-mentioned sum was, by the contract, to be paid in debentures, which were to be issued on the exportation of merchandise, for which a drawback is allowed by the laws of the *United States*. This was so paid by the defendants to the plaintiffs, before the trial, but after the commencement of the action.

Whenever full satisfaction has been received by the plaintiff before the trial, it is as effectual a bar to his recovery, as if it had

been paid *before the commencement of the action*. This was determined in the case of *Bird vs. Randall*. (5) That was an action brought by the plaintiff against the defendant, for seducing his journeyman to leave his service. *Burford*, the journeyman, had covenanted to serve *the plaintiff, in his [* 335] trade of silk-dresser for five years, for which the plaintiff was to pay certain stipulated wages. For the performance of the contract, articles of agreement were entered into, by deed, whereby the parties agreed to perform, each his respective part, under a penalty of one hundred pounds. Before the expiration of the time of service, the defendant enticed *Burford* to leave the plaintiff's service. The plaintiff brought an action of debt for the penalty against *Burford*, and recovered judgment for it with costs. Afterwards, and before any satisfaction of the judgment had been obtained, this action for the seduction was commenced; after which, and before the trial, the judgment against *Burford* was satisfied. The question was, whether the action, under the circumstances of the case, could be supported against *Randall* for the seduction.

For the plaintiff it was insisted that, for two reasons, the defendant could not avail himself of the payment of the judgment by *Burford*. 1. Because the payment of a penalty, according to contract, by one, could not be deemed a satisfaction for a tort by another; that a recovery in an action for a *breach of contract* could not be a bar to an action against another for a *tort*. 2. That at the time of bringing the action, there was no *actual satisfaction* had; therefore it ought to have been pleaded. On both points, the Court were unanimously against the plaintiff; and upon the last point, that a full satisfaction *after* the commencement of the action, and *before* the trial, need not be pleaded, but might be given in evidence under the general issue, the opinion of the Court was so decided, that it was strongly suggested that the Court would, upon the application of the defendant *by way of motion*, have stayed the plaintiff's further proceedings against him, upon the defendant's showing that the plaintiff had *actually received* the money recovered by him in his former action against the servant.

Now, in the case at bar, the price of the sugars was to be paid in three instalments. The two first, it was proved, *had been paid; and it was agreed that the [* 336] last was, by the contract, to be paid in debentures, which had been delivered by the defendants, and received by the plaintiffs, before the trial.

In all cases of *assumpsit*, whatever shows that a complete satisfaction has been received by the plaintiff may be given in evidence under the general issue. It is true, that before the decision of the case of *Bird vs. Randall*, it might have been doubted whether such satisfaction could be given in evidence under the issue of *not guilty* in an action for a *tort*; but it ought never to have been a doubt whether there was a distinction between those cases, where the satisfaction was made *before*, and those where it was made *after* the commencement of the action. In the reason, nature, or justice, of the thing, there can be no such distinction.

Besides this, without entering upon the ground upon which the direction of the judge at the trial was principally contested by the counsel, I am of opinion that the direction was right, for this obvious reason, that it is impossible for the Court to take judicial notice, that a sum of *certificates of debenture*, which was in fact promised, is of the same value as *specie*, which, in the count on which the trial was had, is alleged to have been promised. Indeed, I have not *any* knowledge that so is the fact. It follows, of course, that it is impossible for us to say, from this record, that the contract *alleged* and the contract *proved* are *substantially* the same. This, therefore, is not like the case of *Brooke & Al. vs. White*, cited at the bar, and other cases, where it is apparent that the contract alleged and the contract proved are substantially the same. I do not, however, mean to suggest an opinion whether the principle, which governed the case of *Brooke & Al. vs. White*, is, or is not, well founded.

As it is agreed that all the counts are for the same cause of action, and as it appears, from the report of the trial, that the [*337] plaintiffs have received full satisfaction for it, it *would be unnecessary to proceed to consider the question arising upon the pleadings, but for a suggestion from the bar, that there are several other actions, which depend upon the same circumstances, and which will be governed by a decision in this.

The question presented by the pleadings arises upon the second count.

This count alleges that, in consideration of sugars sold and *delivered* on the ninth day of December, 1807, the defendants promised the plaintiffs to pay them two several sums of money, and to deliver to them certain *certificates of debenture*.

The plea in bar is only an answer to that part of the promise which relates to the delivery of the debentures. It alleges the embargo law of the *United States*, and relies upon its having excused the defendants from performing this part of their promise.

The replication states, in substance, that, after the passing of the

embargo act, and after it was known to the defendants, *viz.* on the thirty-first day of the same December, they demanded the *delivery* of the sugars; which was begun on that day, and continued until the sixteenth day of the ensuing January, "in virtue of the sale as aforesaid, to them made on the said ninth day of December."

The argument implied by this replication is, that the defendants, having demanded and received the sugars, after they knew of the passing of the embargo act, under the engagement which they had previously made, ought not to be excused from fulfilling that agreement, or from being answerable for the breach of it; and it rests upon this hypothesis, that, although there was a contract for the delivery of the sugars before the embargo, yet that they were not delivered until afterwards. But the count expressly alleges that the sugars were sold and *delivered* on the ninth of December. The case, then, inevitably *implied* by the *replication*, is inconsistent with that affirmed in the *declaration*; and, of consequence, the replication is a departure. *The question, then, pre- [* 338] sented by the pleadings, is, whether the plea contains a good bar to the demand of the plaintiffs.

The plea alleges that the certificates, which were promised to be delivered, "were certain certificates, to be granted and issued by the officers of the customs of the *United States of America*, on the exportation of the said sugars, mentioned in the plaintiffs' declaration, and that the said certificates could not be obtained unless the said sugars should be exported;" that they, in a reasonable time, did all things necessary and proper to procure the certificates; but that, after making the promise, and within such reasonable time, the embargo was laid, which rendered it impossible to obtain the certificates of debenture; and that while it so remained impossible the action was commenced.

Every fact, which is pertinent and well pleaded, and not contradicted, must be considered as true. Hence it follows, that by the act of the government it was rendered *impossible* for the defendants to perform their promise, from the time there was a breach of it, until the commencement of this action. The certificates could only be obtained on the exportation of the sugars purchased. The officers of the customs could not, but upon such exportation, issue the certificates; but before a breach of the promise, it became impossible, in consequence of the embargo, to export the sugars, or procure the certificates. The defendants were, of course, prevented inevitably, and without any fault on their part, from performing their promise.

Now, it is clearly settled, by innumerable authorities, that whenever a contract, which was *possible* and *legal* at the time it was

made, becomes *impossible* by the act of God, or illegal by an ordinance of the state, the obligation to perform it is discharged; (6) or, if such ordinance be temporary, the obligation is suspended during its continuance. In the case at bar, the contract, at the time it was made, was legal; and before any fault could be [* 339] imputed to the * defendants for the breach of it, a performance became impossible by an act of the legislature. This must excuse them; and it is indifferent whether the act of congress was constitutional, or, as was suggested in the argument, was unconstitutional. It was an ordinance of the state, over which the defendants had no control, whereby it was rendered impossible to perform the contract. (c)

I forbear to conjecture which of the parties, in cases of this sort, have been subjected to the most inconvenience and loss. The plaintiffs have been kept out of their debentures, and prevented from discharging by them their bonds for duties, where such bonds were due; and the defendants have had fixed in their possession large quantities of an article purchased for exportation, and of which probably greatly exceeded the demand for home consumption, and the value of which was of course proportionably diminished. We cannot weigh, and, if we could, it would not be in our power to apportion, the losses which this measure has occasioned, in a greater or less degree, to almost every individual in the community. It is sufficient that we discern a clear and known rule of law, that excuses defendants, in cases circumstanced like the present, for not delivering such debentures during the continuance of the embargo.

Parker, J., not having been present at the argument, gave no opinion. The reporter has been authorized to say that *Thatcher, J.*, concurred with the two justices, whose opinions are stated above.

The Chief Justice did not hear the cause, being related by affinity to one of the parties.

Per Curiam. Judgment for the defendants.

(6) 1 *Rol. Abr.* 451. — *Co. Lit.* 206, a. — *Com. Dig. Condition*, 14. — *W. Jones's R* 179. — *Dyer*, 28, a. — *Plowd.* 186. — 1 *L. Raym.* 317, 321. — *Salk.* 198. — 2 *Eq. Ca Abr.* 26. — *Wood's Inst.* 234. — *Bac. Abr. Condition, N.* — *Vin. Abr. Condition.*

(c) [*Vide Platt on Cov.* 587, 588. — *ED.*]

* MERIAM JOHNSON *versus* JOSHUA RANDALL.

A justice of the peace, taking a recognizance for appearance, must return the recognizance to the court where the recognizer is to appear; and if such court has not power to award execution upon a *scire facias*, it must certify the recognizance to some court where such execution can be awarded.

A justice of the peace can bind the putative father of a bastard child to answer only by taking a bond, and not by recognizance.

THE writ in this case was a *scire facias* commenced in the Court of Common Pleas, praying for an execution upon a recognizance, entered into by the original defendant to the plaintiff before a justice of the peace, conditioned to appear in the Municipal Court, and there to answer to the plaintiff, on a charge of being the putative father of her bastard child. The writ alleges that the defendant was called to appear at the Municipal Court, but made default. There is a demurrer with causes, and a joinder in demurrer, on which the plaintiff below had an award of execution.

The demurrer was argued March term, 1809, by *Parker* for the plaintiff, and *Thurston* for the defendant.

While the argument was proceeding, *the Court* observed to the plaintiff's counsel that he could not support his declaration, (since it did not appear, from the record, that the justice had returned the recognizance to the Municipal Court, or that the Municipal Court had certified it to the Court of Common Pleas, where it should be entered of record;) that a *scire facias* upon a recognizance must be sued in the court where the recognizance was recorded; that justices of the peace, taking recognizances for appearance, must return them to the court where the recognizer was to appear; and if from the jurisdiction of that court, it could not award execution upon a *scire facias*, it ought to certify the recognizance to some court, where such execution could be awarded; that, by the statute of 1783, c. 51, the Sessions are directed to certify the recognizances returned there, by any justice of the peace, to the Common Pleas, if the recognizance be forfeited for the default of the conusor, with a record of the default; and for the same reason, the Municipal Court ought to certify the recognizances returned there, with the default of the conusor thereon, to the Common Pleas, where it should be entered of record; and if a court refused to certify a recognizance, *without a sufficient cause, this [* 341] Court could compel it by *mandamus*.

The plaintiff then moved for leave to amend, upon payment of costs; but the defendant, denying the charge, said he was ready to answer the plaintiff at the Municipal Court, take his trial, and per

form the judgment; and that his default upon the recognizance arose from accident, and was not intentional.

The Court then proposed to the parties to proceed to a trial in the Municipal Court; and that in the mean time this action should stay; and if the defendant should appear and abide the order of the Municipal Court, then no further proceedings should be had; and to this the parties agreed.

The defendant afterwards refused to appear and take his trial in the Municipal Court; and the plaintiff, having examined the records of the Municipal Court, and found the recognizance regularly returned and certified to the Court of Common Pleas, and there entered of record, obtained leave to amend his *scire facias*, to make the averments comport with the record.

To the writ and declaration, thus amended, the defendant demurred; relying on this, as the ground of his demurrer, that a justice of the peace is not authorized to require a *recognizance* from a man charged as the putative father of a bastard child, but a *bond* only to the mother. (1)

At an adjournment of this term, holden on the 29th of July, the opinion of the Court was delivered to the following effect by

PARSONS, C. J. The point made by the defendant's counsel came before us, in the case of *Merrill vs. Prince*, (2) at the last term in *Cumberland*; and the Court were clearly of opinion that a justice could only bind the putative father to answer by requiring a bond from him, and not a *recognizance*. That case will be reported, with the reasons at large of the opinion of the Court.

The statute mentions a bond as the security to be given by the putative father. And when the condition of a bond [* 342] * is broken, the Court may relieve against the penalty upon equitable terms; but not against a *recognizance*, if it be forfeited. It is our opinion that in this case the demurrer must prevail, and the declaration be adjudged bad and insufficient for the plaintiff to maintain his action.

Costs for the defendant.

(1) See *Stat.* 1785, c. 66, § 2.

(2) Vide *post*.

SAMUEL SWETT & AL. *versus* WILLIAM SULLIVAN.

By the *final judgment*, mentioned in the statute of 1784, c. 10, § 3, within one year from which *scire facias* must be served upon bail, is intended the first judgment, or, which the plaintiff may sue out an execution; whether such judgment be rendered in the Common Pleas or in this Court; and a judgment on review is not intended.

THIS was a *scire facias* against the defendant, as bail of *Abraham Ogden*, to obtain execution of a judgment, recovered by the plaintiffs against the said *Ogden*, in this Court, November term, 1807, for the sum of 3693 dollars 83 cents debt or damage, and 136 dollars 90 cents costs.

The defendant prays oyer of the bail bond, (which is dated May 23, 1803,) and then pleads in bar to the *scire facias*, that the original writ, upon which *Ogden* was arrested, was returnable to the Court of Common Pleas on the first Tuesday of July, 1803, when and where it was entered and continued to the then next October term of that court, from whence it was carried by appeal to this Court, holden in November, 1803, and thence, by divers continuances, to November term, 1805, when a verdict was returned against the said *Ogden* for the sum of 3188 dollars 10 cents damage, upon which *final judgment* was there rendered on the last day of said term, *viz.* on the 8th day of January, 1806, as by the record thereof now remaining in said Court appears; that the plaintiffs sued out their execution upon the said judgment on the 11th day of February, 1806, which was, on the 11th day of March following, duly returned in no part satisfied; that he, the said *William*, was at all times, within one year after the rendition of said judgment, ready to bring the said *Ogden* into Court and surrender him, before any judgment could have been rendered on any writ of *scire facias*, which might have been issued on said judgment, but that the plaintiffs did not, within one year, cause *any [* 343] *scire facias* to be issued against him as bail, &c.; that the defendant was liable, by force of the said bond, for one year after the rendition of said final judgment, and no longer; that the judgment recited in the writ of review was not rendered upon the original writ, upon which *Ogden* was arrested, but in a certain action or process of review of a plea of the case aforesaid, wherein the writ of review was purchased by said *Ogden* on the 1st day of February, 1806, returnable to the then next March term of this Court, from whence it was continued to November term, 1807, when the now plaintiffs recovered the judgment mentioned in the writ of *scire facias*; and that, in the said action or process of review,

the defendant was not the bail of *Ogden*, nor bound for his appearance therein, nor in any manner bound or holden that *Ogden* should abide said last-mentioned judgment. And this, &c. ; wherefore, &c.

The plaintiffs in their replication allege that, at the term of this Court holden here in November, 1807, they recovered *final judgment* in the suit aforesaid, commenced at the Court of Common Pleas, July term, 1803, and in which the now defendant became bail as aforesaid, against said *Ogden*, for the sum of 3693 dollars 83 cents debt or damage, and 136 dollars 90 cents costs, as by the record thereof remaining appears ; and which judgment now remains in full force ; and that said *Ogden* has not abided or performed said judgment, but has avoided, and a return of *non est inventus* has been duly made on the execution which issued on the said judgment. And this they are ready to verify by said record ; and they pray said record may be seen and inspected by the Court here. Wherefore they pray judgment, and that they may have execution, &c.

The defendant rejoins that the judgment of November, 1807, was not the final judgment, in the suit commenced at the Common Pleas in July, 1803 ; but that final judgment was rendered in that suit November term, 1805 ; and that there is no such [* 344] record of final judgment in said action, * wherein he became bail, as the plaintiffs have alleged ; and he also prays that the said record may be inspected here, and that the plaintiffs may not have execution against him, and for his costs.

The cause was argued at the last March term in this county, by *Dexter* for the plaintiffs, and *Otis* and *Sullivan* for the defendant.

Dexter contended that the judgment on review is properly to be considered as the final judgment in the original suit. Under the existing statute, granting reviews in civil actions, (1) the first judgment is vacated, by bringing the review, and a new trial of the same action is had. The language of the statute is, that the party may review the *same cause*, and have *one trial* more ; that there shall be no further pleadings, but *the action* shall be tried by the issue originally joined ; and when either party shall bring a review, *the whole cause* shall be tried in the same manner as if no judgment had been given thereon ; the statute in every part of it considering a review merely as a further proceeding in the original action.

Where a defendant reviews, as was the case here, and judgment

(1) Stat. 1786, c. 66

is given for the original plaintiff, such judgment can never be considered as rendered upon the defendant's writ of review, but must be founded on the plaintiff's original writ, and the bail must therefore be answerable where their principal avoids upon such judgment.

The writ of review, under the present statute, is a judicial writ, to which the party cannot plead; whereas the writ, under the former provincial act, (2) was in nature of an original writ, upon which property might be attached, or the defendant in review held to bail, and each party had "the benefit of any new plea and evidence."

For the defendant, it was insisted that the judgment rendered in this Court, on the original writ and declaration, was the final judgment in the action, in which the defendant became bail. It was rendered by the highest court of appellate jurisdiction, and the party recovering it had a *right to demand his [* 345] writ of execution; unless the plaintiff in review would give him sufficient security that the judgment in the review should be satisfied. No such security having been given in this case, the plaintiffs had a right to sue out execution, as they did, and it was then their duty, if they would avail themselves of their remedy against the bail, to sue out their *scire facias* within the year from entering up their judgment. (3)

By the statute of 1784, c. 28, § 11, it is enacted that "all goods and estate attached upon mesne process, for the security of the debt or damages sued for, shall be held for the space of thirty days, after final judgment, to be taken in execution." If the *final judgment* in this provision should be construed to be the judgment which may be rendered upon a review, then property attached must be held by the officer for the space of two years from the rendition of judgment in any original action; for so long is a party aggrieved by judgment allowed to bring his writ of review; and in cases of the disabilities mentioned in the statute, (4) the two years are to run from the removal of those disabilities.

The cause stood over to this term, when the opinion of the Court was delivered to the following effect by

PARSONS, C. J. In this writ, the plaintiffs pray execution of a judgment recovered by them against *Abraham Ogden*, at the November term of the Supreme Judicial Court, holden at *Boston*, and for whom the defendant was bail.

The defendant has pleaded in bar of execution against him, that

(2) 13 Will. 3, c. 16.

(3) Stat. 1784, c. 10, § 3.

(4) Stat. 1786, c. 66, § 1.

he was bail for *Ogden*, in a suit commenced against him by the plaintiffs, in which final judgment was recovered against *Ogden*, at the November term of the Supreme Judicial Court, holden at *Boston*, in 1805, on which judgment an execution had been duly issued and returned unsatisfied; and that the judgment recited in the *scire facias* was recovered at the November term of the Supreme Judicial Court, holden at *Boston*, in 1807, on a writ sued by [* 346] *Ogden* against *the plaintiffs, to review the former judgment recovered in 1805, and that on this last writ he was not bail for *Ogden*.

The plaintiffs reply, that the judgment recited in their *scire facias* was the final judgment on the original writ sued by them against *Ogden*, on which the defendant was his bail, which judgment was rendered at the said November term in 1807, which they are ready to verify by the record.

The defendant rejoins, that there is no such record of the final judgment alleged by the plaintiffs in their replication.

Upon these pleadings, the record has been submitted to the inspection of the Court, whence it appears that the judgment, of which execution is prayed against the defendant, was in fact rendered on the writ sued out by *Ogden*, to review the first judgment; but whether it is also the final judgment rendered on the original writ prosecuted by the plaintiffs against *Ogden*, in which the defendant was bail, is the question remaining for the consideration of the Court.

The writ of review in civil actions is provided by statute, to correct errors in judgments rendered on verdicts, and is unknown at the common law. Either party, against whom two verdicts have not been found, may sue his writ of review as of right, returnable to this Court, from which it must issue, to correct the errors in fact of the judgment rendered on verdict. Upon the return of the writ, the whole cause is subject to revision on the former pleadings, and no amendments can be made, or any new issues joined; and the jury may find their verdict for the original defendant, or for the original plaintiff, with greater or less damages than he recovered at the former trial, whichever party shall sue the writ of review. By comparing the two verdicts, the error of the former verdict, if any, is apparent; and this error will be corrected by the judgment on the review.

[* 347] * This is a short statement of this singular process; and it has been argued by the plaintiffs in *scire facias*, that the judgment in review is in law a final judgment upon the original writ, within the statute of 1784, c 10, regulating bail in civil actions.

By this statute, the bail upon the original writ are not holden, unless the *scire facias* against them be served on them within one year next after the entering up of final judgment against the principal.

The provincial statute of 5 *Will. & Mar. c. 5*, of which the other statute is a revision, limits the suing of a *scire facias* against the bail to one year after the *first trial*. As the original writ is returnable to the Court of Common Pleas, where a judgment is rendered, from which either party aggrieved may appeal to this Court, where a new judgment is rendered, it was formerly contended, that the first trial intended in the provincial statute, was that on which judgment was rendered at the Common Pleas. But a different construction of that statute always prevailed; because, as no execution could be sued in the Common Pleas, on a judgment from which an appeal was entered, the principal, by entering an appeal, which he could do of right, might always discharge his bail. The first trial, mentioned in that statute, was holden to be the trial, on which the first judgment, on which the plaintiff might sue an execution, was entered. Thus, if there was no appeal from the Common Pleas, the judgment there rendered was the first judgment; but if there was an appeal, the judgment in this Court was the first judgment.

In the revision of the statute we have been considering, the legislature, instead of retaining the former phrase of *first trial*, have substituted the expression of *final judgment*; leaving the construction without alteration.

If the final judgment in the last statute should be taken to be the judgment on review, great mischiefs would be *the consequence. Either party might review at any [*348] time within two years after entering judgment on the appeal. The bail might, therefore, be holden for several years; when the situation and property of the principal might be essentially changed, and a party arrested might find it impracticable to procure bail. And after the entering of judgment on the appeal, and until the return and entry of the writ of review, no suit would be pending, so that the bail could surrender the principal; and were the bail, as the keeper of the principal, to take him into his own custody and imprison him, after detaining him two years, no writ of review might then be sued out, and the principal would be discharged, after having been confined a long time, without benefit to any person, and to his own great damage.

Nor is there any inconvenience in giving the statute of 1784 the same construction as the statute of *W. & M.* received. For if the plaintiff should review, his writ might be an attachment, on which

he might take new security. And if the defendant should review, the plaintiff might still execute his judgment recovered on the appeal, in which the bail would be holden, unless the defendant gave bond to stay the plaintiff's execution; and in that case the bond would be adequate security.

It is therefore our opinion, that the final judgment, mentioned in the statute of 1784, is the first judgment on which the plaintiff may sue out an execution. If no appeal lies from the judgment of the Common Pleas, or if none is made, that judgment is final; or, if there is an appeal, then the judgment on the appeal is final; for on either of these judgments execution may issue.

The judgment of the Court must be, that there is no such record as the plaintiffs have averred in their replication, and that the defendant recover his costs.

[* 349]

*THOMAS LEE, JUN., AND OTHERS, *versus* WILLIAM R. GRAY.

A cargo was insured from *Boston* to *Rotterdam* and *Amsterdam*. On the outward passage, the master received notice of the *British* orders in council, declaring the ports of *France*, &c., in a state of blockade, and in consequence thereof proceeded to *Plymouth*, in *England*, for the purpose of procuring intelligence. While at this latter port, he was informed of the *French* decrees, which declared all vessels, &c., good prize, which had been at a *British* port. By the laws of *England*, at that time, he could not clear for a port in *Holland* without leaving a part of the cargo. Upon this he went to *London*, where the cargo was discharged for the benefit of all concerned. As soon as the assured heard that the cargo was unloading in *London*, they abandoned the cargo to the underwriters on the ground of a total loss of the voyage. It was held that the going to *Plymouth* was no deviation; that the prohibition there to export a part of the cargo to *Holland* was not an arrest or detainment by princes, &c.; that the going from *Plymouth* to *London* was a deviation; and that the underwriters were not liable, as for a loss of the voyage.

CASE upon a policy of insurance upon property on board the ship *Meridian*, *Robert Lord* master, from *Boston* to *Rotterdam*, or *Amsterdam*. The policy was dated October 31st, 1807, and was opened for 40,000 dollars, of which the defendant subscribed 5,000 dollars.

The plaintiffs declare for a total loss, which they allege as follows: "The said ship, with the said property of the plaintiffs laden on board, proceeded on the voyage mentioned in the policy on the first

of November, 1807; and afterwards, viz. on the 3d day of December following, being at sea, and proceeding on the voyage aforesaid, was arrested and restrained by certain persons, being subjects and servants of the king of the united kingdom of *Great Britain and Ireland*, and acting under the authority of the said king, then being on board the armed ship called the *Active*, of which one *John Lusk* then was the commander, and was by the said persons then forbid, prevented, and restrained, from going to her said ports of destination; and the said ship was thereupon obliged to proceed, and did proceed, to the port of *Plymouth*, in the said united kingdom; whereby the said voyage, on which the said vessel was bound as aforesaid, was entirely interrupted, destroyed, and lost; and the said property of the plaintiffs became and was entirely lost to them."

The cause came before the Court on a case stated by the parties, in which it was agreed, that while the ship was pursuing her voyage, the master had notice from a *British* privateer of the *British* orders in council of the 11th of November, 1807, by which the port of *Rotterdam* was placed under the same restrictions respecting trade, as if actually blockaded; and all neutral vessels bound thither were made subject to capture as prize, unless cleared out from **Great Britain, Gibraltar, or Malta*; that there- [*350] upon the master could not have proceeded to his destined port without great danger of being captured, and he therefore proceeded to *Plymouth*, in *England*, to procure further intelligence and advice how to act, and while lying in that port the ship was greatly damaged by a violent storm, which damage was not repaired until the 4th of February following; that while in *Plymouth* the master was informed of the *French* decree of December 17th, 1807, by which all vessels which had been boarded by a *British* ship, or which had submitted to make a voyage to *Great Britain*, or which had cleared out from any port therein, should be considered as good prize; that the master, having knowledge of the operation of this decree in *Holland*, determined, on the 29th of February, 1808, to proceed with the ship to *London*, but was prevented by head winds from sailing until the 1st of April following; that on her arrival at *London*, on the 18th of April, the cargo was landed for the benefit of all concerned; that the ship could not have been cleared out from *Plymouth* for *Rotterdam* with cotton on board, of which about a tenth part of her cargo consisted, but the same must have been unladen before any such clearance could have been obtained; that as soon as the plaintiffs had notice that the ship had begun to unlade in *London*, they made an offer to the defendant to abandon, which was refused.

The cause was argued at the last March term, in this county, by *Prescott* and *Jackson* for the plaintiffs, and *Dexter* and *Otis* for the defendant.

For the plaintiffs, it was observed that this case was easily distinguishable from that of *Richardson & Al. vs. Maine F. and M. Insurance Company*. (1) Here was an actual restraint, and prohibition by the government of the country where the ship lawfully was; for it will not be pretended that the going to *Plymouth* for advice, under the circumstances which caused it, was a deviation

In that case, the voyage was discontinued from the mere [* 351] fear of a *peril; but had the ship gone to the nearest and most convenient port of safety to procure intelligence, she would still have been protected by the policy. While lawfully at *Plymouth*, she was prohibited by the government of the country from going with her cargo to her port of destination. It is immaterial whether all or a part only of the cargo was thus interdicted. The defendant undertook that we should carry the whole cargo to *Rotterdam*. We were prevented by a peril within the policy, viz. the restraints and detainments of all kings, &c. The voyage was thus completely broken up and lost. Had the ship gone to *Rotterdam*, leaving the cotton in *England*, the ship and cargo would have been confiscated in *Holland* for that very fact. Besides, though the cotton constituted but a minor portion of the cargo, it might be the portion on which the principal profit was calculated.

For the defendant, it was insisted that, if the voyage was defeated, it was not defeated by any of the perils insured against. Detainment of princes must intend some actual force, but never was used as a mere prohibition to carry particular articles of cargo to a particular port. Here was no arrest, as an embargo. The very prohibition was but temporary, and it was the duty of the assured to have waited until it was removed.

Though the going to *Plymouth* was no deviation, yet the continuing there, and the going to *London*, was a deviation, by which the underwriters were discharged.

The action was continued for advisement to this term, when the opinion of the Court was delivered by

PARSONS, C. J. (after briefly stating the facts agreed.) The question is, whether the plaintiffs are entitled to recover for any loss within the policy, which insures against all the usual risks.

As no damage is stated as having happened to the goods insured, the only ground of claim is for a total loss, arising from the loss of

the voyage insured. It must be admitted that the voyage has been wholly lost ; but unless this loss * is from [* 352] some peril insured against, the plaintiffs must fail, unless some exception be made with respect to the cotton.

When the master had notice of the *British* orders, and understood that he could not afterwards proceed to his destined port, he departed from the course of his voyage, and arrived at *Plymouth*. As this was done for a good cause, and for the purpose of procuring intelligence and advice, and not with the intention of discontinuing the voyage, his proceeding is no deviation. It also appears that, after he arrived at *Plymouth*, finding new obstacles to the prosecution of his original voyage, he determined to proceed to *London*, and there discharge his cargo ; but was prevented by head winds from sailing until the 1st of April, 1807. As an intention to deviate, where a ship has commenced the voyage assured, is no deviation, this determination of the master is no deviation ; which must be considered as commencing on her sailing from *Plymouth* for *London*, for then the original voyage was abandoned. Therefore, whatever loss, from any of the perils insured against, happened before the 1st of April, is a charge on the underwriters.

It appears that the ship met with considerable sea damage while in the harbor of *Plymouth*, for which the underwriters upon the ship are answerable.

But the policy before us is only on the merchandise. Now, if the voyage was lost by a peril within the policy, that peril must be either capture, or the arrest and detention of a prince. But the departure from the direct course of the voyage, and the final abandonment of it, were not from capture, but from the fear of capture, which is not insured against. And there appears to be no arrest and detention of any prince.

For when the ship was in *Plymouth*, she might have cleared even for her port of destination ; but the danger of proceeding thither was too imminent, in consequence of the *French* decrees, to justify that measure ; or the ship might have returned home with her cargo. Indeed, no fact is stated which can be correctly construed as an arrest. It is true * that the cotton was [* 353] refused to be cleared at *Plymouth* for *Rotterdam* ; but this was no arrest. For the refusing in a foreign country to clear out a vessel for any particular port, or ports, cannot be deemed an arrest within the policy, while the vessel remains in the master's possession, with liberty to proceed to any but the prohibited ports.

In this case, it is manifest that, if the cotton might have been cleared out, the master would not have availed himself of it to pro-

ceed to his destined port. We cannot, therefore, find any peril insured against, by which the voyage has been lost. (a)

Plaintiffs nonsuit.

(a) [*Richardson & Al. vs. Maine Insurance Company*, 6 Mass. Rep. 102. — *Cook vs. Essex Insurance Company*, 6 Mass. Rep. 122. — *Wheatland vs. Gray*, 6 Mass. Rep. 124. — *Amory vs. Jones*, 6 Mass. Rep. 318. — *Shepley vs. Tappan*, 9 Mass. Rep. 20. — *Breed vs. Eaton*, 10 Mass. Rep. 21. — *Brewer vs. Union Insurance Company*, 12 Mass. Rep. 170. — *Tucker vs. United M. F. Insurance Company*, 12 Mass. Rep. 288. — Ed.]

JOSIAH ROBINSON *versus* STEPHEN MEAD.

The action of replevin is local in its nature, and must be brought in the county where the goods and chattels are taken or attached.

THE plaintiff, naming himself of *Boston*, sued this writ of replevin of a chaise attached by the defendant, a deputy sheriff, of the county of *Middlesex*, at *Cambridge*, in said county.

The defendant pleaded property in a stranger, and, after a verdict, finding the chaise to be the property of the plaintiff, moved in arrest of judgment for the following cause:—

“Because the said *Robinson*, by his own showing in his writ aforesaid, hath alleged that the goods and chattels therein mentioned were taken and attached by said *Mead* in *Cambridge*, in the county of *Middlesex*, and not in the county of *Suffolk*, in which last county the said writ was sued out and made returnable; whereas, by the law of the land, the said *Robinson* ought to have sued out his writ of replevin for the said goods and chattels, if any just cause he had, in the Court of Common Pleas, established and holding pleas in the said county of *Middlesex*, and not in the said county of *Suffolk*.”

The cause was argued at the last March term in this [* 354] * county, by *Davis*, solicitor-general, and *Munroe*, for the plaintiff, and *Fuller* for the defendant.

Fuller, in support of the motion, relied on the statute of replevins, (1789, c. 26, § 4,) which provides that “when any goods or chattels shall be taken, distrained, or attached, which shall be claimed by a third person, and the person thus claiming the same shall think proper to replevy them, in case such goods and chattels are of the value of more than four pounds, he may take out and prosecute his writ of replevin from the clerk’s office of the Court of Common

Pleas, *in the county where the goods and chattels are thus taken, distrained, or attached.*" The statute then prescribes the form of the writ; and the plaintiff, having pursued his remedy on the statute and adopted its forms, was bound to conform to its directions, as to the court in which he should prosecute.

Fuller also cited the observations of Lord Mansfield, in the case of *Mostyn vs. Fabrigas*, (1) respecting the locality of trials; and the case of *Lucking vs. Denning*. (2)

Davis, solicitor-general, and Munroe, for the plaintiff, insisted that the action was not local; and that, if it was, advantage should have been taken in abatement. If the defendant neglects to plead it in abatement, he loses the benefit of the objection, which, after the trial on the merits, cannot support a motion in arrest of judgment. In support of these positions, they cited *Carth.* 11, 63, 124, 354, 25, 448.—*Chitty on Pleading*, 421, 430.—*Bac. Abr. Courts, &c.*, D.—4 *Mass. Rep.* 591, *Cleaveland vs. Welsh*.—2 *Mass. Rep.* 102, *Whiting vs. Hollister*.—6 *Mod.* 102, *Crosse vs. Bilson*.—4 *Com. Dig. Pleader*, 3, K. 13.—1 *Com. Dig. Action*, N. 11.—*Willes*, 431, *The Bailiffs, &c. of Litchfield vs. Slater*.—1 *Saund.* 247, *Craft vs. Boite*.—2 *Lev.* 164, *Adderly vs. Wise*.—1 *Show.* 343, *Drew vs. Barksdale*.—1 *Vent.* 263, *Jennings vs. Hunkin*.—2 *Lev.* 121. S. C.—3 *Keb.* 350. S. C.—*Comb.* 472, *Calverly vs. Leving*.—* *Carth.* 448. S. C.—*L. Raym.* 330. S. [* 355] C.—7 *D. & E.* 583, *Mayor of London vs. Cole*.

At this term the Court decided that the action was local in its nature, and the judgment was arrested.

Costs for the defendant.

(1) *Coop.* 176.

(2) 1 *Salk.* 201

SETH TAYLOR AND THADDEUS WILSON *versus* NOAH PORTER.

Where a mortgagor assigns the land mortgaged to two or more tenants to hold in common, if they resist the entry of the mortgagee, or drive him to an action to foreclose, each assignee is to be considered as a deforciant of the whole.

If two distinct closes are included in a mortgage, and the mortgagor convey the closes in fee to different persons, by whom they are held in severalty the mortgagee must have two several writs of entry to foreclose the mortgage.

TAYLOR & AL. vs. PORTER.

But, in such case, the mortgagee shall have judgment on each writ, unless the whole mortgage money be paid.

If either grantee shall pay the whole money, the mortgage is discharged as to the others, who shall be holden to a reasonable contribution to him who so pays.

THIS was a special writ of *entry sur disseisin*, brought to foreclose a mortgage, and was submitted to the determination of the Court on the following facts agreed by the parties:—

On the first day of April, 1805, *Uriah Cotting* and others were seised in fee of the demanded premises, and on that day conveyed the same to the demandants, who on the same day conveyed the same in fee and in mortgage to the said *Cotting* and others, to secure the payment of three several promissory notes given for the purchase money, viz. one note for 690 dollars, and two notes for 1035 dollars each. On the second day of the same April, the demandants executed a deed of bargain and sale of the same premises to *Artemas Newhall* and *Leavitt Lincoln*, who on the same day executed to the demandants a deed of mortgage of the premises, conditioned to save the demandants harmless from the notes and mortgage which they had given to *Cotting* and others. On the twenty-seventh of March, 1806, *Leavitt Lincoln* conveyed one undivided moiety of the premises to *Porter*, the tenant, who undertook to discharge and pay one half of the money due [* 356] to *Cotting* and others. The tenant * has paid all the money due to *Cotting* and others, excepting 380 dollars, and excepting also one year's interest on one of the notes for 1035 dollars, amounting together to 442 dollars 10 cents. The other undivided moiety of the premises was conveyed by *Artemas Newhall* to *Robbins* and *Inman*, who undertook to pay one half part of the money due on said notes to *Cotting* and others. *Cotting* having become proprietor of the whole debt due upon said first mortgage by releases from his partners, on the 15th of October, 1807, conveyed to the tenant, for his account and risk, the two notes of 1035 dollars, deducting the 442 dollars 10 cents, paid as above mentioned. At the time when he conveyed said notes to *Porter*, the tenant, the said *Cotting* held said mortgage deed; and afterwards assigned it to *Chelly* and *Martin* by *Porter's* direction.

Taylor and *Wilson* now demand the whole of the mortgaged premises of *Porter*, who never had any title or claim to more than one undivided moiety, and who never was in possession, except as tenant in common with some other person or persons.

The demandants found their claim upon the aforesaid payment of 442 dollars 10 cents. The tenant claims to hold one undivided moiety of the demanded premises under said *Lincoln*. And it was

agreed by the parties that if the Court should be of opinion that the demandants can maintain this action under the above circumstances, and that they are entitled to possession of the demanded premises, as mortgagees, for condition broken, judgment should be rendered, as in cases of mortgage, for the above sum of 442 dollars 10 cents, with interest; otherwise that the demandants should become nonsuit, and the tenant recover his costs.

No argument was had, and the opinion of the Court was delivered by

PARSONS, C. J. (after summarily stating the facts.) On these facts we are satisfied that the demandants are *en- [*357] titled to sue upon the mortgage, upon which they have declared, as a security for the 442 dollars 10 cents paid by them on the said notes, they having been damnified in that sum by paying it to *Cotting*.

But three questions arise. Shall they have the conditional judgment to have seisin of the lands mortgaged, unless 442 dollars 10 cents are paid by the tenant? Or shall they have a conditional judgment to recover seisin of a moiety, unless the tenant will pay a moiety of that sum? Or shall they have any judgment, as they have not sued all the tenants in common?

As the title of the demandants under the mortgage is to a sole seisin, it seems very clear that if they can have judgment on this writ, that judgment must be for sole seisin, unless the money necessary to indemnify them be paid; otherwise the mortgagee might have his sole tenancy changed into a tenancy in common. And it is our opinion, that the demandants in this case are entitled to the conditional judgment against the tenant, who must be considered as a deforciant, and, therefore, as to them be taken to be a tenant, against whom the whole freehold can be demanded; although as to others he may be tenant in common of a moiety. For in a writ of entry to foreclose a mortgage, the demandants count against the assignee of the mortgagor as the immediate wrong-doer, and not as having entered by the mortgagor; because the assignee must hold subject to the mortgage, has a right to redeem, and his title is lawful against all but the mortgagee, or him who claims under him. But if the mortgagor shall assign to more than one as tenants in common, yet as to the mortgagee, when they resist his entry, or drive him to an action to foreclose, each assignee is to be considered as a deforciant of the whole.

If two distinct closes are included in the same mortgage, and the mortgagor convey the closes in fee to different persons, *by whom they are held in severalty, the mortgagee to [*358] foreclose must have two several writs of entry; because

each grantee under the mortgagor holds but a part in severalty, of which he is a several deforciant. But in such a case the mortgagee shall have judgment on each writ, unless the mortgage money be paid; because each close is liable for all the money due on the mortgage. And if either grantee shall pay the money, the mortgage is discharged as to the other. And when there are two or more grantees under the mortgagor, whether severally or in common, if either pay off the mortgage, the others shall be holden to a reasonable contribution.

Let the tenant be called, and judgment be rendered for the demandants to have seisin, unless 442 dollars 10 cents, with the interest, be paid within two months.

Bigelow for the demandants.

Sullivan for the tenant.

JOHN BARNARD *versus* JOHN WHITING & AL.

Where a general verdict had been found at a previous term, upon a declaration containing several counts, one of which was bad, the plaintiff was permitted to amend the verdict [by the minutes of the judge] so as to take it upon such counts only as were sufficient; all the counts being for the same cause of action.

THIS was an action of the case in *assumpsit*. The declaration contained five several counts. A trial was had before *Parker, J.*, upon the general issue pleaded to all the counts, and a general verdict upon all the counts found for the plaintiff. The defendants moved in arrest of judgment, because the last count was bad, and the verdict being found upon all the counts, judgment ought not to be rendered upon it.

The count, to which the objection was made, was as follows, *viz* "for that the said *W. and F.*, at, &c., on, &c., being indebted to the plaintiff in the sum of 2172 dollars in bills of the Penobscot bank, of the value of 2172 dollars, before that time had and received by them, the said *W. and F.*, to the use of the plaintiff, in consideration thereof, then and there promised the plaintiff to [* 359] pay and satisfy * the same to him when they should be thereunto required; yet, though requested," &c.

By the Court. The last count is clearly bad. A general count of *indebitatus assumpsit*, for money had and received, must be for cash; but here it is for bank bills. Judgment cannot be rendered on this count.

But the judge, who sat at the trial, has certified to us that all the counts in the declaration were, in fact, for one and the same cause of action. He might have directed a verdict upon such count as the evidence applied to. And, although he did not do this, the plaintiff may yet amend his verdict, by taking it on either of the counts, upon this certificate of the judge, notwithstanding it is not of the same term.

The verdict was accordingly so amended as to find for the plaintiff upon one count only; and judgment was entered upon it so amended.

Whitman and *J. Richardson* for the defendants.

Williams and *Bigelow* for the plaintiff.



WILLIAM BOYD *versus* EDWARD DAVIS.

Where an action for money had and received was submitted, by a rule of the Court to referees, and in the rule the plaintiff agreed that he had no other demand against the defendant; the referees reported that the defendant still held sundry notes, the proceeds of which, when collected, would belong to the plaintiff, and gave a list of them, such agreement is no bar to a future action for the said proceeds when collected.

ASSUMPSIT for a large sum of money had and received by the defendant for the plaintiff's use. The action had been referred by a rule of Court to certain referees, and in the agreement it was stated that the plaintiff had no demand against the defendant, but what was included in the present action.

From the report of the referees it appeared that the defendant, who had been many years the keeper of an insurance office, in which the plaintiff had been an underwriter, had in his hands promissory notes, payable to himself as office-keeper, amounting nearly to 3000 dollars, which were given as premiums upon risks undertaken by the plaintiff, *and which he sup- [* 360] posed had been collected by the defendant before the commencement of this action. As the money had not been in fact collected, the referees did not award it to be paid to the plaintiff, but annexed a schedule of the notes to their report, and declared that the defendant would be accountable for them when collected.

The plaintiff's counsel objected to the acceptance of the report, apprehending that, from the terms of the rule, he would be barred

from recovering, in any future action, against the defendant, for his laches in neglecting to collect the moneys due on the notes.

Per Curiam. The referees have expressly negated the plaintiff's concession in the submission, that he had no other demand on the plaintiff than for money received; and that concession will, therefore, be no bar to his recovery in a future action, if he shall prove in such action that, by the defendant's laches, the notes belonging to the plaintiff have become of no value to him.

Liternore and Parker for the plaintiff.

Amory and Ritchie for the defendant.

C A S E S

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF YORK, MAY TERM, 1811,
AT YORK.

PRESENT:

HON. THEOPHILUS PARSONS, CHIEF JUSTICE.
HON. SAMUEL SEWALL, } JUSTICES.
HON. GEORGE THATCHER, }

THOMAS THOMES, *qui tam*, &c., versus DANIEL CLEAVES.

A conveyed to *B* land of the value of 1600 dollars, for the consideration of 350 dollars; *B*, at the same time, undertaking to reconvey it upon payment of 522 dollars 97 cents, at two instalments, the last within three years from the date of the contract; no part of the 522 dollars 97 cents were paid: it was held that *B* was not liable to a *qui tam* action for taking usurious interest.

THIS was a popular action brought to recover two several penalties, alleged to be forfeited by the defendant, by force of the statute of 1783, c. 55, against usury, for receiving of one *James Rounds* usurious interest on two several corrupt usurious contracts.

The defendant pleaded the general issue, upon which a trial was had before *Sedgwick*, J., November term, 1809.

At the trial no evidence was produced but of one contract between the defendant and *Rounds*; and as evidence in support of the action, and to prove the corrupt contract stated in the plain-

tiff's first count, he offered a deed from *Rounds* to the defendant, conveying sixty-two acres and a half of land, which he also offered to prove were worth, at the time of the conveyance, sixteen hundred dollars, and that the defendant, in fact, paid therefor no more than three hundred and fifty dollars. The defendant had, by a memorandum in writing not under seal, agreed with *Rounds*, that if the latter would pay the defendant five hundred and twenty-two dollars ninety-seven cents, at two instalments [* 362] * the last of which was within three years from the date of the conveyance, he would convey to *Rounds* all the right to the land which he, the defendant, had under *Rounds's* deed to him; the plaintiff then offered to prove that the contract, although disguised as a purchase of, and a contract to reconvey land, was, in truth, a mere loan of money upon a usurious agreement. He also stated that, except the said conveyance of land to the defendant, he had no evidence to prove that the defendant had received any thing whatever of *Rounds*, upon or towards the said loan.

Whereupon the judge directed a nonsuit, with liberty to the plaintiff to move to have the same set aside, and a new trial granted, if the said direction should, by the Court, be determined to be wrong.

At the last May term, in this county, *Holmes*, of counsel for the plaintiff, moved the Court to set aside the nonsuit; and he urged that this was an indirect but gross attempt to evade the wholesome provisions of the law against excessive usury. Here was a loan of money, and a conveyance of land made as a pledge to secure the repayment, with usurious interest. Pursuant to the contract, the pledge has become forfeited, and the defendant has an absolute title to the land. If he is not answerable in this action, the law seems to have furnished no method in which oppression of this kind can be reached. The forfeiture of the land is equivalent to the payment of the money by *Rounds*. Although originally intended only as a security for the payment of the money and the usurious interest agreed upon, yet, being forfeited, and the whole power of redeeming it gone from *Rounds*, it has become payment.

King, for the defendant, contended, that no money having been paid, there was no fulfilment of an usurious contract, if such a one had been made. It is essential to the nature of a loan, that the thing borrowed is at all events to be restored; (1) and it is settled, that evidence of usury shall not be given, in a prosecution

(1) 3 Wils. 395, *Murray vs. Harding*.

THOMES, *qui tam*, vs. CLEAVES.

for the penalty, unless the money has been actually and wholly paid. (2)

* If the plaintiff recovers in this action, the defendant [* 363] is exposed not only to lose the money loaned by him, but also to forfeit the land, and the amount of the loan by way of penalty.

But the defendant has a right to say that this was an actual sale; and because *Rounds* might think the land worth more than the consideration paid, the defendant gave him the right of preemption. This right he should have pursued; and when he had paid the money, if the agreement was corrupt and usurious, he would not then have been without his remedy.

Holmes, in reply. By the very act of selling the land, *Rounds* was disabled from raising the money to redeem it. *Non constat* that the defendant will ever lose the land; and as to the money, there is no pretence that he has a claim to recover it in addition to the land.

If a simple practice of this kind is sufficient to avoid the forfeiture for usury, the provision of law inflicting the forfeiture may as well be repealed, for it will in every case be evaded.

The cause stood over to this term for advisement, and now

PARSONS, C. J., delivered the opinion of the Court, after stating the action and the substance of the judge's report.

The propriety of the judge's direction at the trial is the question before us.

The agreement may be usurious, and the conveyance made by *Rounds* to the defendant, as a part of such agreement, may be void; but the penalty is not incurred unless the lender, in fact, under the agreement, corruptly receive above the sum of six pounds for giving day of payment for one hundred pounds for a year, or after that rate; in which case he shall forfeit the full value of the money or thing loaned. The plaintiff's counsel has accordingly argued that three hundred and fifty dollars were loaned, and * that the conveyance of the land, by *Rounds*, to the [* 364] defendant, was a receipt by him of usurious interest for giving day of payment.

But we are satisfied that this argument ought not to prevail, because it is founded on an erroneous idea of the agreement. If the conveyance of the land was a payment of interest, in consideration of giving day of payment of the principal sum of three hundred and fifty dollars, then, under this agreement, *Rounds*, after the agreement, remained indebted to the defendant in that sum.

 THOMES, *qui tam*, vs. CLEAVES.

But the manifest intent of the parties was, that, on the defendant's receiving this conveyance from *Rounds*, the latter was discharged from any demands the defendant had against him on account of this loan. *Rounds* might repurchase the land of the defendant on an usurious payment of the money.

We are therefore satisfied, on the plaintiff's own statement, that the land was received by the defendant, not as a payment of usurious interest, but as a security for the repayment of the three hundred and fifty dollars, with usurious interest. And as a repayment of this sum, or of any interest thereon, has never been made the penalty, to recover which this action was sued, has not been incurred.

As it is very clear that *Rounds*, on proving the case stated by the plaintiff, may avoid his conveyance of this land, the conclusion is equally clear, that this conveyance must be considered as a security for the repayment of the money borrowed, with the illegal interest, and not as an actual payment of that interest, or any part thereof. A nonsuit of the plaintiff was, therefore, in our opinion, very properly directed by the judge, and the defendant may have judgment upon it.

Cost for the defendant.

[* 365]

* JONAS CLARK *versus* THE UNITED FIRE AND MARINE
INSURANCE COMPANY OF PORTLAND.

A ship is insured from the *United States* to *Cork* or *Liverpool*, either or both; after passing *Cork*, contrary to the intentions of the master, so far that it was impracticable to reach it in the then state of the wind and weather, although it was practicable to go to *Liverpool*, the master bore away for *Dublin*, to gain information of the state of the markets, and in the course thither a loss was incurred. It was held that this was no deviation, and that the underwriters were liable for the loss.

Of the adjustment of a general average upon a valued policy.

CASE upon a policy of insurance, whereby the defendants assured for the plaintiff 2000 dollars on the ship *Olive Branch* and cargo, on a voyage "from *Kennebunk* to *Cork* or *Liverpool*, either or both, and at and from thence to her port of discharge in the *United States*;" 1500 dollars on the vessel, and 500 dollars on the cargo, the vessel being valued at 6000 dollars.

The declaration, after stating the policy and averring the plaintiff's interest in the subjects of the insurance, alleges that the s...

ship was, in the course of her outward voyage, by the force and violence of the winds, &c., stranded on a bank near *Arklow*, in *Ireland*, whereby the ship, freight, and cargo was put in jeopardy, and damaged, and part of the cargo lost; and that the ship being disabled from proceeding on her voyage, was forced to go to *Dublin*; and by this means, as well as in repairing the damages and paying salvage, &c., the sum of 2000 dollars was expended; whereby the defendants became liable to pay to the plaintiff the sum of 1200 dollars, &c. There is also a count for 1000 dollars laid out and expended for the use of the defendants.

The defence was, that there was a deviation, by which the insurance was vacated. Upon this point the parties agreed to submit to the decision of the Court upon certain facts stated.

It appears, from the agreed statement, that the master of the ship, on her departure from the *United States*, received from the owners written instructions or orders, in which they directed him to proceed to the port of *Cork*, in *Ireland*, and if he could there sell the cargo for an amount stated, he was to dispose of it there; but if he could not obtain that price, he was to go to *Liverpool*, and there discharge. When the ship arrived in *St. George's* channel, *she being leaky, and the weather being thick and [* 366] foggy, no land was discovered until the ship had, in consequence of the fog, and contrary to the intentions of the master, passed *Cork*, and had got so far up the channel that the master found it impracticable to beat back to that port, the wind being against him, and his vessel crank and leaky. The state of the weather and the ship rendering her stay in the channel perilous, it became necessary to bear away, either for *Dublin* or *Liverpool*, for safety, these being the nearest ports to leeward. *Dublin* being nearer than *Liverpool* to *Cork*, and it being easier to return to *Cork* from *Dublin*, the master thinking that he could at the latter place inform himself of the state of the markets at *Cork* and *Liverpool*, and ascertain whether it would be at all necessary for him to go to more than one of his destined ports; for these reasons only he preferred *Dublin* to *Liverpool* as his port of safety, and in proceeding thither, and out of the direct course to *Liverpool*, the loss in question happened.

On these facts it was agreed that if the Court should be of opinion that the plaintiff could by law maintain his action, the defendants should be defaulted, and the plaintiff's damages be assessed under the direction of the Court. Otherwise the plaintiff was to become nonsuit.

The action, being continued *nisi* for argument, was called up by the Court the following week at *Portland*, when

E. Whitman, of counsel for the defendants, contended, 1. that the deviation was not necessary; and, 2. if it was, it was greater than the degree of necessity would justify.

The insurance in this case was to *Cork* or *Liverpool*, or both. The undertaking of the insurer was only upon the ground that the assured should use due means and endeavors to effect the object. If the master could not reach one of the ports, he was bound to endeavor to reach the other. When he found he could not reach *Cork*, his duty was to endeavor to reach *Liverpool*, in effecting which there appears to have been no difficulty. Having a right to go to both ports, he might have gone to either first, and [* 367] * afterward to the other, without any regard to their geographical order, and still he would have been within the policy. If the intention was to go to *Cork* at all events, yet as he could have reached *Liverpool* as a port of safety, as easily as he could *Dublin*, he was certainly bound to do it, as that would have been the most expeditious method of terminating the voyage. The going to *Dublin* was then a deviation, inasmuch as it unnecessarily prolonged the voyage.

But, admitting that the insured might elect to go to *Cork* first, and admitting, too, that such election had been made, which, however, does not appear, yet there was an unnecessary deviation. There were several harbors equally safe with that of *Dublin*, and much nearer to the place from whence the departure commenced. But the master did not choose to enter either of them; and he has assigned the reason why he did not. He could better learn the state of the markets there, and thence determine the future course of his voyage. Here, then, was a deviation, greater in extent than the necessity warranted, and not occasioned by necessity alone, but undertaken for the purpose of gaining information. The voyage was not performed with a view to its expeditious termination, and with all reasonable despatch; and in consequence the vessel sustained the damage for which indemnity is sought by this action. If the voyage had been duly pursued, the ship could hardly have failed to perform the voyage.

Mellen and *Emery* for the plaintiff.

By the Court. This was clearly a departure from necessity. If the ship had been bound under the policy to have gone first for *Cork*, or if an election was left to the assured, and the master had before the departure made his election to go first to that port, and had been prevented, as here, by causes insured against, he had a right, within the policy, to bear away to *Dublin*, to obtain information as to the state of the markets at *Cork* and *Liverpool*, and from thence to go to either at his choice, as his information and

CLARK vs. UNITED FIRE AND MARINE INSURANCE COMPANY.

*judgment should lead him. The plaintiff has main- [* 368]
tained his action, and *is entitled to judgment.*

After the opinion of the Court was pronounced, and the defendants were defaulted, the question of the amount of the damages, to which the plaintiff was entitled, was submitted to the determination of the Court without argument, upon an agreed statement, the substance of which will appear in the opinion of the Court, which was afterwards delivered in *Boston* at an adjournment of the last March term in *Suffolk*, by

SEWALL, J. The plaintiff, owner and interested one quarter part in the ship *Olive Branch* and her cargo, was insured thereon the sum of 2000 dollars, viz. 1500 dollars on the ship, and 500 dollars on the cargo, in a policy underwritten by the defendants, in which the ship is valued at 6000 dollars. The voyage insured being from *Kennebunk* to *Cork* or *Liverpool*, the ship was stranded in the course of it, according to the former state of facts, and the decision thereon, and having been relieved from the disaster, at some expense and loss, she arrived afterwards with her cargo at *Dublin*, in *Ireland*.

It has been agreed by the parties, that the expenses and damages incurred by the disaster, computed at the sum of 4924 dollars, shall be adjusted as a general average upon the ship, cargo, freight, and a deck load, to be included on account of some peculiar circumstances in the estimate of the loss and in the contribution. The parties also agree that, in this adjustment, the value of the property as at *Dublin* shall be taken, and that the ship was there worth 8000 dollars, the cargo 5510 dollars, the freight 1094 dollars, and the deck load 332 dollars; and it is considered by the parties that each particular is assessed at this valuation; and that there has been sustained and paid thereon a loss and contribution of 28 $\frac{3}{4}$ per cent. They further agree that the value of the cargo, as shipped, and at the commencement of the risk, was 2000 dollars.

*Upon this statement, the Court are to determine [* 369]
what sum for the loss demanded is recoverable upon this policy; whether the whole sum, supposed to be assessed upon the plaintiff, and paid by him, upon his quarter part of the ship and cargo; or only the same rate of loss upon the sum insured, which was paid upon the supposed valuation at *Dublin*. The plaintiff contends that his whole interest is to be considered as insured and covered by the policy, and therefore that he is entitled to recover against his insurers the whole sum lost and paid, in the supposed general average, upon his quarter part of the ship and cargo; notwithstanding the increased valuation as taken at *Dublin*, by which the contribution is apportioned and assessed.

Questions are continually arising on the operation and practical construction of policies of insurance — a species of contract liable to a variety of incidents, and to be enforced in a great number of cases distinguishable from each other in the principles applicable to the decision. For rules to govern in these inquiries, there is a more than ordinary reference to established usages; and these, when ascertained, are found to be suitable applications of general principles, or not inconsistent with them, or with the tenor of the contract to be explained and enforced, are considered as authoritative upon the parties. A reference to usage is fairly implied in contracts of a commercial nature, and is to be presumed, indeed, in the construction of contracts generally, where the conclusion is not avoided by special circumstances or stipulations.

Rules of this description and authority have been derived to us from our parent country, from usages established in *England*, and recognized in judicial decisions there (1) and in this state. Among these will be found the following, applicable to the present inquiry: —

1. That the value of a vessel and goods, as an insurable interest, is to be taken at the port of lading, or where the risk commences.
2. That this value may be proved by a stipulation [*370] between the parties, *as in a valued policy; and then, in the event of a total loss, the value is understood to be settled without further proof. But valued policies have this operation only in the event of a total, and not in the adjustment of a partial loss, whether general or particular. And, 3. That in averages and contributions, the value, as between the parties interested in the adventure or property liable, is to be taken as it may be estimated at the time and place of the adjustment. (2)

The effect of this subsequent valuation, in determining the proportion of loss recoverable by the assured in a case of general average, has not been settled, I believe, by any judicial decision; and I have not found any rule or usage respecting a case, where the circumstance has occurred of a valuation in adjusting a general average, materially varying from the value of the property as insured. The reason may be, that the case is very unusual, where goods are to be estimated at a very considerable advance and profit, besides the expense of freight, in adjusting a contribution for salvage at their port of discharge; and it may at least be conjectured, that never before did a vessel become a third part more valuable, in a foreign port, and after a long voyage, than she was in the port from which she sailed, and at the commencement of her voyage; unless

(1) Vide *March*. 541.

(2) *Molloy*, Lib. II. c. 6, § 16. — *Ibid.* c. 5, § 4. — *Abbott*, 347

by means of some addition and repairs of an extraordinary nature made in the course of the voyage.

The case of *Lewis vs. Rucker*, (3) decided by Lord *Mansfield*, has proved a leading case on the subject of the adjustment of partial losses. The decision itself settled the manner in which the proportion of a partial loss, recoverable from the insurer, is to be estimated, when goods, insured at their full value, arrive at the port of discharge after sustaining some sea damage in the course of the voyage. The amount of damage is to be ascertained by a sale of the damaged goods; the price obtained for them is to be compared with the price of similar articles, arriving in a sound state at the same port; and the deficiency of price * fixes the [* 371] *per centum* or proportion of loss, recoverable from the insurer according to the sum insured, not exceeding the value of the goods at the place of shipment, or where the risk insured commenced. That case arose upon a valued policy, and the assured was allowed the value stipulated, the insurance being to the same amount. But *Marshall* observes upon it, that this happened, because the value stipulated was taken to be the real value at the place of shipment; and this is plain from the reasoning of Lord *Mansfield*, according to the report of that case, in which the principles and usages, which govern in cases of partial loss, are very fully stated and recognized.

In the subsequent case of *Le Cras vs. Hughes*, (4) where the value in the policy exceeded the interest of the assured, it is more explicitly stated to be the constant usage, in cases of valued policies, to adjust a partial loss in the same manner as if the policy were an open one. The court proceeded upon that ground, and the value stipulated in the policy was disregarded in estimating the sum recoverable, it being considered as a case of partial loss.

The loss now demanded is also a partial loss; there is no pretence for calling it a total loss; there has been no abandonment; and the ship and goods were taken by the assured, as having arrived at their port of destination. The loss in question is not a deduction in kind, or a direct damage sustained; but in the nature of a charge incurred, the amount of which is fixed in money by the supposed assessment. The expedients of a sale, or of an estimate of the property at the port of destination, employed in the cases cited, are not required in this case, to ascertain the amount of damage; although the parties have thought an estimate necessary for the purpose of determining the proportion of loss recoverable from the underwriters. As it respects the ship insured, this is also a case of a valued policy.

(3) 2 Burr. 1167.

(4) Park. 111. — Marsh. 84.

Upon a ship valued at 6000 dollars in the policy, the plaintiff has paid the sum of 575 dollars, for his quarter part of the sum assessed by the estimate of value at *Dublin*, as agreed by the parties.

[* 372] * Is he to be reimbursed and indemnified to that amount ?

The defendants object, that the sum assessed, as the proportion of general average due or paid upon the ship, supposes the plaintiff's quarter part to have been of the value of 2000 dollars, and he is insured, by the policy in question, only 1500 dollars upon that interest.

I am not prepared to say what would be the decision, in the case of a general average actually adjusted in a foreign port, between several underwriters having distinct concerns, where a ship, insured at her full value at the time of sailing, had been, against the will of the owner or his agent, assessed, and the assured had unavoidably paid, upon an increased valuation unreasonably insisted on. In such a case, the aggravation of the loss might be considered as the consequence of a peril insured against; and the assured, having covered the full value of the vessel, might be entitled to recover the entire sum necessarily expended in the general average. The vessel continuing the same, not enlarged or altered, the estimate, attributing to her an increase of value, would be, in the case supposed, no real change in the state of the property, insured at its full value.

Nor is a vessel, generally speaking, an article upon which a profit in a foreign market can be insured or expected; nor is it usually sent to a foreign port for sale. It is rather the instrument of trade and business, like a shop or warehouse, than the immediate subject of traffic; and the voyage and employment are ordinarily estimated as a diminution of value to a vessel, and as a matter of expense to the owner; for which he expects an indemnification in the hire or freight, or in the profits accruing from the use of the vessel in the carriage of his own goods. It is perhaps upon these considerations, that a variety of positive regulations have been established from time to time in foreign states, as to the *degree* in which a ship shall be liable to contribute in a case of general average. (5)

But the case now presented is materially different, in [* 373] * the circumstances relied on for the plaintiff, from the case supposed. No reason is assigned for an increased value of the ship on her arrival at *Dublin*, supposing the stipulated value to have been the full value at *Kennebunk*, where the risk commenced. The parties have not agreed, in the state of facts, that the value there was as stipulated, and no more; and in the adjustment of partial losses, valued policies are to be treated as open poli

cies, and the insurer is not to be prejudiced or injured by a stipulation, which is commonly made at the nomination of the assured, without examination or inquiry. In the event of a total loss, the insurer is liable only to the extent of his premium, received as a consideration for his undertaking. When this is enforced according to the letter of it, he sustains no injury, whether the value stipulated exceeds or falls short of the interest of the assured. In that case, supposing an over-insurance by means of a valued policy, the objection to the transaction is altogether of a public nature; and is grounded upon those moral and political considerations, which require contracts of insurance to be restrained to the cases of real interest, and to indemnities for actual losses; and, supposing the property undervalued, there is no objection to the contract, arising from those considerations.

But a mistaken or false valuation would, if adhered to in the event of a partial loss, produce an operation, under some circumstances at least, injurious to the insurer; and the fair intentions of the parties would not be carried into effect. This may be explained by supposing the case of a ship, valued in a policy of insurance at half her real value, and insured to the same amount. If every partial loss, say sea damage, ascertainable by the expense of repairs, or a contribution in a general average, the amount of which is fixed by the adjustment, were recoverable upon such a policy to the full amount, as happening to a property fully insured, the premium of insurance, as to every risk of that kind, would be reduced one half; that is, for 100 dollars underwritten, the insurer would pay for a supposed loss as to him, *to the extent of an [* 374] insurance upon 200 dollars; and although more than the actual loss would not be in that case recovered, yet the indemnity would be obtained from the wrong hand, and from a party not liable to the extent, by the fair intentions of the contract.

The rule is, however, fixed and established by usages for a long time recognized, and by several judicial decisions, and is upon these considerations reasonable and satisfactory, that stipulations of value, when they are questioned and disputable, are to be disregarded in cases of partial and average losses. And the rate of the loss being ascertained, the insurer is liable in the proportion, which the sum insured bears to the actual value of the property included in the risk described in the policy.

The impossibility, as I may say, of the rise in value of a vessel in a foreign port, such as is supposed in the case at bar, leads strongly to the conclusion that the supposed value at *Dublin*, as stated in the agreement of the parties, establishes only the fact, that the ship was not insured at her full value; and then there really is no question

in the case, as it respects the ship. As to 500 dollars of the sum upon which the average loss on the ship is calculated, the plaintiff was his own insurer, to use the mercantile expression, from the commencement of the risk insured; and that insurance, and not this, is liable to the assessment.

The incomplete statement of facts makes it necessary to say further, that, if 6000 dollars was in fact the value of the ship at the time to which the insurance relates, the insurer is not liable to the extent of an average loss, so materially aggravated by the supposed increase of value, attributed to her when she arrived at *Dublin*; an estimate wholly unaccountable upon that supposition, but upon circumstances of alteration and accession to the interest of the assured, after the policy was effected, and for which the insurers by this policy are not liable: such, for instance, would be an important enlargement or improvement of the hull, or a provision of [* 375] rigging and furniture of an extraordinary nature, * not included in the valuation by the policy, and made after the departure of the vessel. For, as to an additional value arising from an accession of that kind, the assured would be, I think, his own underwriter, as in the other case.

It seems, however, best to accord with the state of facts to understand the value at *Dublin* as establishing the fact, that the ship was undervalued by the stipulation; and as neither insurer nor assured are concluded by a stipulation of value in the adjustment of a partial loss, the average recoverable on the ship must be restricted to the sum insured on the ship.

In the second place, respecting the cargo, which is liable also for the proportion of the general average, the value, as shipped, was 2000 dollars, and no more; and at that value the plaintiff's interest in the cargo was fully insured, to the extent of the prime cost. Cargoes are shipped to foreign markets in the expectation of an additional value, to accrue to them on their arrival. When this reasonable expectation, operating in the course of trade, is fulfilled, the shipper has acquired a new property; which may, in fact, and ought to be, distinctly valued and estimated in a contribution calculated at the port of discharge. A charge and expense, by which the arrival is procured, is assessed upon the cargo at its increased value; an estimate necessarily including, with the prime cost, the profits accruing thereon at the foreign market. For this assessment the shipper is not to be indemnified by the insurer upon the prime cost, unless his contract is, by any usage or rule, to be extended to the security of the profits. The prime cost of a cargo of goods, and the expected profits on their arrival at a foreign market, are, in practice at least, treated as distinct insurable interests. The insurer-

ance upon the goods is restricted to their value at the port of lading, or their prime cost, including all expenses upon them until laden on board. But it is not unusual to have an insurance upon the expected profits, *eo nomine*, made at the *same time, [*376] as upon an interest which may be distinctly valued and estimated.

Anciently, in *England*, the usage was, in cases of jettison and contribution, to take the value of the goods thrown out, and those liable to the contribution, at the prime cost, when the accident happened before the voyage was half performed. This rule is prescribed in the ancient treatise *Consolato Del Mare*. The more modern usage is, however, as has been stated, to take their value at the place where the average is adjusted.

One consequence of this usage may be, in a particular case, that goods arriving free of damage, but subject to some charge or expense, which is the price of their safety from a peril insured against, are so considerably increased in value from their prime cost, as that a net profit upon them is to be taken and calculated in the assessment, where a general average is in fact adjusted abroad; and this after deducting all expenses of freight; which, forming a separate item in the contribution, is not to be included in the valuation of the goods. When this happens, — and it is supposed to have happened in the case at bar, — this additional value, being in fact a profit upon the adventure, is to be considered as an interest acquired to the assured, distinct from the prime cost of the cargo; and the contribution paid or calculated upon it, is not recoverable by virtue of an insurance covering the goods at the prime cost.

This reasoning, and the conclusions drawn from it, apply exclusively to the case of sums or articles liable in the contribution, but not covered by the policy of insurance. Of this description is the sum, in which the vessel was undervalued by the policy, and the amount of profits gained on the adventure or cargo of goods, as valued at the port of discharge, sums introduced in the case at bar by the particular agreement and consent of the parties.

The question in the present case is not the proportion of damage sustained, that being fixed by the computation *in money; but what proportion of the loss thus as- [*377]certained is recoverable on this policy. And it is the opinion of the Court, that the defendants are liable in the proportion which the sum underwritten by them upon the vessel bears to the actual value of the vessel when insured; and the valuation stated in the policy is not to be regarded; and that the defendants are also liable for the whole sum paid upon the cargo, valued at the prime cost; but not for the contribution calculated upon the in-

CLARK vs. UNITED FIRE AND MARINE INSURANCE COMPANY.

creased value or profits of the cargo, as estimated at the port of *Dublin*.

The result is, that the sum of 575 dollars is the loss upon the part of the ship and cargo insured by the policy in question ; from which is to be deducted the abatement of one per cent., stipulated by the policy ; and to the balance is to be added interest from the time it became due and payable.

—•—

AARON PORTER *versus* EBENEZER SAYWARD.

In *debt* for an escape of one committed upon execution, the plaintiff is entitled to recover the whole sum for which the prisoner was held.

DEBT against the defendant, under-keeper of the jail in *Alfred*, in this county, for the escape of one *Theodore Beal*, a prisoner committed in execution at the plaintiff's suit.

On the trial of the cause before *Thatcher, J.*, at the last November term in this county, the plaintiff having proved the judgment, execution, commitment, and escape of *Beal*, and that the escape was by the permission and consent of the defendant ; this latter moved the judge to be permitted to give evidence, that *Beal*, at the time of the commitment and escape, was wholly destitute of property, and had so continued to the time of the trial. The judge refused to admit the evidence ; and the jury returned a verdict for the sum due on the execution.

The defendant excepted to the decision of the judge, and the cause stood over to this term upon the said exceptions.

[* 378] * *Per Curiam*. The evidence offered at the trial was very properly refused. It has been holden, ever since the statute of *Westm. 2*, that an action of debt lies against a jailer for an escape of a prisoner in execution ; and that in such action the plaintiff is entitled to recover from the jailer the amount which was due to him from the prisoner. And this provision of the law is perfectly reasonable in cases of voluntary escape, as the one in question was proved to be.

Let judgment be entered on the verdict

Vide 2 D. & E. 126, Bonafous vs. Walker. — 2 W Black. 1048 Hawkins vs. Plomer.

COMMONWEALTH *versus* EZEKIEL GOWEN.

An indictment lies for a nuisance on a town-way.

In an indictment for a nuisance on a public way, it is not necessary to allege the continuance of such nuisance to be with force and arms.

THE defendant was indicted at the last May term in this county, for that he, on, &c., at, &c., "with force and arms, in and upon a certain town-way there legally laid out, accepted, and established as a town-way of the said town of *Shapleigh*, (which way leads and extends from the dwelling-house of *G. Ham*, to the dwelling-house of *A. Dragdon*, in said *S.*) did unlawfully and injuriously put, place, and erect a certain fence, in, upon, and across the highway aforesaid; and the same fence did then and there unlawfully and injuriously continue, and suffer to be and remain from, &c., to the day of the finding of this bill; whereby the way aforesaid, for and during the whole time aforesaid, was wholly obstructed, so that the citizens of the commonwealth were prevented from passing and repassing, &c., as they have a right, and have been wont to do; to the great injury and common nuisance of all the citizens of said commonwealth having occasion to pass, repass, and use the way aforesaid, against the peace and dignity of the commonwealth, and contrary to the form of the statute in such case made and provided."

* At the last October term in this county, the de- [* 379]
fendant was tried and convicted; after which he moved
in arrest of judgment, assigning the following reasons, *viz.*

"1. It does not appear by said indictment that the defendant is charged with any offence by law indictable.

2. The way mentioned in said indictment, for the obstruction of which the defendant is charged, is not particularly nor definitely described.

3. The defendant is indicted for erecting a *nuisance* on a *town-way*.

4. The way mentioned in said indictment does not appear to be a *public highway*.

5. It does not appear that the continuance of the same nuisance on said way was with *force and arms*."

Holmes, in support of the motion, insisted that no indictment lies for a nuisance, except for one erected on a public highway, laid out for the use of the citizens of the commonwealth at large; whereas a town-way was for the accommodation of the inhabitants of the town only, and no indictment lies for its interruption. He contended also that the description of the way, as contained in the

indictment, was wholly insufficient, inasmuch as it might not include the whole of the way. And he held the indictment defective, in not charging the continuance of the nuisance to be with force and arms.

Davis, solicitor-general, cited the statutes of 1786, c. 67, § 7, and 1786, c. 81, § 6, in both which encumbrances on town-ways are considered as nuisances, and are made liable to presentment by the grand jury. The indictment alleges that all the citizens of the commonwealth have a right to pass and repass in this way, and the verdict finds all the allegations in the indictment to be true. As to the description of the way, it was sufficient to say that no evidence could be received of any encumbrance, but such as was between the *termini* mentioned in the indictment. As to the continuance being laid without alleging it to be with
[380] force *and arms, it was a sufficient answer to this objection, that so are all the precedents.

And of this opinion was the Court; and so the defendant took nothing by his motion.

THE INHABITANTS OF ALFRED, Plaintiffs in Error, *versus* THE INHABITANTS OF SACO.

Error does not lie upon a judgment rendered on a case stated and submitted by the parties to the opinion of the Court.

THE writ of error in this case was brought to reverse a judgment of the Court of Common Pleas for this county, rendered in an action originally commenced by the plaintiffs in error, before a justice of the peace, for expenses incurred in the support of a pauper alleged by them to have his legal settlement in the town of *Saco*. The action being carried by appeal to the Common Pleas, and the only question being whether the pauper's settlement was or was not in *Saco*, the parties submitted that question to the determination of the Common Pleas, upon certain facts stated, and it was agreed that, if the opinion of that court should be, that the pauper had not his legal settlement in *Saco*, the plaintiffs should become nonsuit. Such being the opinion of the court, the plaintiffs became nonsuit accordingly, and the defendants had judgment for their costs.

The Court, being of opinion that error does not lie to reverse a judgment rendered, as in this case, upon a case stated and referred by the parties to the opinion of the Court, did not hear the errors assigned, but quashed the writ of error.

* JOSEPH PRAY *versus* MOSES PIERCE.

A conveyance of land, when recorded, relates back to the time of its execution ; and is evidence of a seisin in the grantee from that time against all persons, except a subsequent purchaser from the grantor without notice.

A trespass on the land of another will not amount to an ouster, without a knowledge thereof by the owner, either express or implied.

Where one has pleaded the general issue to a writ of entry, it is not competent to him to prove himself tenant at will of the land demanded.

A release to one not in possession, if made for a valuable consideration, will be construed to be any other lawful conveyance, by which the estate might pass.

THIS was a writ of entry, brought to recover possession of a parcel of land in *Lebanon*, in this county, and was tried upon the general issue, before *Thatcher, J.*, at the last October term in this county.

At the trial, the defendant read in evidence a deed of *William Rogers* to *Benjamin Gowell*, by which, for the consideration of £40, *Rogers* bargained and sold to *Gowell* the demanded premises, with the usual covenants and warranty. The deed bore date July 7th, 1779, and was recorded February 28th, 1805 ; also, a deed, dated November 23d, 1785, duly acknowledged, and recorded November 1st, 1810, from said *Gowell* to *Ivory Hovey*, in consideration of £20, conveying the demanded premises with warranty ; also the deposition of one *Joseph Hardison*, testifying that he was employed by *Hovey* to take the charge of the premises for him, which he did until he understood that *Hovey* had conveyed the same, as hereafter mentioned, to the demandant ; also a deed dated February 1st, 1793, duly executed and recorded June 24th, 1794, wherein said *Hovey*, in consideration of £300, among other parcels of land, remised, released, and forever quitclaimed to the demandant, the demanded premises, covenanting against all claims by, from, or under himself.

The tenant read in evidence a deed from one *James Witherill*, a collector of taxes, to one *Charles Clark*, dated October 18th, 1791, duly executed and recorded December 15th, 1792, wherein, for the consideration of £1, 2s. 8d., paid by said *Clark*, the said collector granted, bargained, and sold the demanded premises to the said *Clark* in fee, saving to the owner the right of redeeming the same.

There was no evidence that the said collector had conformed to the requirements of the law, in relation to the sale of the land ; nor did the tenant show any title to the demanded premises under *Clark*, except a parole demise from him, and an occupation by him under the said demise from the year 1798 to the time of the trial.

[* 382] * The demandant objected to the introduction of this evidence, as it showed *Pierce* to be merely tenant at will. This objection was allowed by the judge.

The tenant proved that he had been in the possession and occupation of the demanded premises for twelve years immediately preceding the trial.

The judge instructed the jury, that, although the two first deeds offered by the demandant were not recorded until long after their respective dates, nor until after the tenant was in possession, still, when recorded, they would have relation back to their dates, and operate as good and sufficient conveyances from that time; and that he deemed the deed from *Hovey* to the demandant to be something more than a naked release, and to be a sufficient conveyance, under our statute of frauds, (as he considered *Hovey* in possession at the time, if *Hardison's* testimony was credited,) to pass the premises to the demandant, and to enable him, without entry, under the deed to maintain this action.

The tenant excepted to this direction and opinion of the judge; and a verdict being found for the demandant, the action stood over to this term, for the consideration of the said exceptions, the tenant moving for a new trial.

The cause was argued, upon the exceptions taken at the trial, by *Holmes* for the demandant, and *King* for the tenant.

Per Curiam. Several questions arise on the exceptions allowed by the judge in this cause.

The first is, that *Hovey*, not having recovered his title-deed until after the deed from the collector to *Clark*, the record was not evidence of *Hovey's* seisin under that deed until it was so recorded.

But we are of a different opinion. The deed of *Rogers* to *Gowell*, and of *Gowell* to *Hovey*, related back to the time of their execution, and shall be evidence of a seisin from that time against all persons, except a subsequent purchaser from *Rogers* to *Gowell* without notice.

[* 383] * Another exception is, that, at the time when *Hovey* conveyed to *Pray*, the demandant, *Hovey* was disseised by *Clark*, under whom the tenant claims.

This objection must depend upon the facts which are in the case. From *Hardison's* testimony, it is in evidence that he had the care of the land of *Hovey*, until he understood that *Hovey* had made a conveyance of it to the demandant. To control this testimony, the tenant has produced to us testimony that *Clark*, previous to the conveyance from *Hovey* to the demandant, had, under color of the collector's conveyance to him, fenced the land and depastured his

cows upon it.† But there was no evidence that *Hovey* had any notice of these acts of *Clark*. Unquestionably, had *Clark* had a good title, and had he, under that title, done those acts, it would have been good evidence of a legal seisin in him. But as nothing passed by the collector's deed to him, those acts of his must be deemed to be trespasses. But they cannot amount to an ouster of *Hovey*, until evidence that *Hovey* had notice of them. Otherwise a private act of trespass on the soil of another might be evidence of an ouster, without any knowledge on the part of the owner of the land. This notice may be proved either by direct evidence of the fact; or the jury may presume it from circumstances in evidence; as when it is proved that the owner's cattle have been turned off the land, or his servants refused an entry, &c.; or a continuance of the trespass for a long time is shown, when the owner or his agent lives in the neighborhood. But, whatever may be the evidence of this notice, it is a fact to be found by the jury, and the Court cannot presume it. And as, in the case before us, this notice is not stated as a fact proved, *Hovey* must be considered as seised at the time of his conveyance to the demandant; and so this objection fails.

* The third objection is to the direction of the judge, [* 384] who refused evidence from the tenant in the action, that he was tenant at will to *Clark*.

But we think the judge acted rightly in this refusal; because, by the writ, the demandant had alleged the tenant to have the freehold, and he, by pleading the general issue, has admitted the truth of the allegation. The evidence offered was therefore repugnant to his plea, and ought not to have been admitted. (a)

The last objection is founded on the nature of the conveyance from *Hovey* to the demandant, it being a release, and there being no evidence that the demandant was in possession at the time of its execution.

It is true that the estate could not pass to the demandant by way of release. But the deed purports to be a conveyance of land, for a valuable consideration; and it is the duty of the Court so to construe it as to give effect to the lawful intent of the parties, and not to defeat it. Upon this principle, a deed of lease and release has been holden to be a covenant to stand seised to uses, where the consideration was a good one. (1) So a bargain and sale from a parent to a child, to take effect after the death of a parent, has like-

† An affidavit to this effect was read, in support of the tenant's motion for a new trial, during the argument at the bar.

(a) [How could the general issue, denying the disseisin, be construed into an admission of the allegation in the writ, that he did disseise, and thereby gain a fee? The position seems really absurd. — Ed.]

(1) 2 *Wils.* 75, *Doe vs. Trunmer & Al.*

wise been holden to be a covenant to stand seised to the use of the parent for life, with a vested remainder to the child in fee; (2) because, as a bargain and sale, it would have been a conveyance of a freehold *in futuro*, and therefore void.

Upon these principles, the conveyance under consideration must be construed to be a bargain and sale, or other lawful conveyance, by which the estate might pass; the recording of the deed being by law equivalent to an actual livery and seisin. (b)

Let judgment be entered on the verdict.

(2) 4 Mass. Rep. 135, *Wallis vs. Wallis*.

(b) [Russell vs. Coffin, 8 Pick. 193. But this construction of the deed seems to be contrary to the settled rules of law. See, however, the *Revised Statutes*.—Ed.]

[* 385]

* ISAAC STROUT AND ANOTHER, Plaintiffs in Error, *versus*
JOHN BERRY.

In trespass *quare clausum fregit*, brought before a justice of the peace, the defendant cannot give evidence of a right of way under the general issue. Such a right of way used for twenty years before the supposed trespass is a sufficient defence.

THIS was a writ of error brought to reverse a judgment of the Court of Common Pleas for this county, upon an appeal from the judgment of a justice of the peace, before whom the action was commenced; in which the defendant in error was original plaintiff, and the plaintiffs in error original defendants.

The action was *trespass* for breaking and entering the close of the plaintiff in *Limington*, and prostrating two rods of his fence.

The defendants severally pleaded not guilty, with a reservation of liberty "to file any brief statement, or give any justification under this issue." Issue being joined, the judgment of the justice was against the defendants, who appealed therefrom to the Common Pleas, and the cause was tried in that court upon the same issue.

At the trial, after the plaintiff had proved the trespass as alleged, the defendants offered to prove, by the testimony of witnesses, that the *locus in quo* was a private way, and that it had been uninterruptedly used and occupied as such, by the defendants and others, for twenty years next before the commencement of the plaintiffs' action. The court refused to admit the evidence, and directed the jury, that, in all actions of trespass *quare clausum fregit*, originally commenced

before a justice of the peace, if the defendant intends to contest the plaintiffs' title to the close wherein the supposed trespass is alleged to have been committed, or to show a title to the same in himself, he must inform the justice thereof by a special plea, or in some other way; in which case the cause ought to be removed to the Court of Common Pleas; otherwise he will have no right to contest the plaintiff's title, or to justify by setting up a title of his own.

* The jury returned a verdict for the plaintiff, and the [* 386] defendants tendered a bill of exceptions to the opinion and direction of the court, and the same was allowed and sealed by the first justice.

The errors assigned were in substance the refusal of the court to receive competent evidence of a right of way offered by the defendants, and the misdirection of the court to the jury.

Holmes, for the plaintiffs in error, contended that this was not a case within the statute of 1783, c. 42, describing the power of justices of the peace in civil actions. The second section of that statute precludes a defendant, in an action of trespass brought before a justice, to offer any evidence that may bring the title of real estate in question. And, by the seventh section, a defendant, in all civil actions triable before a justice of the peace, except such actions of trespass, wherein he means to avail himself, by pleading the title of himself, or any other person, &c., shall be entitled to all evidence under the general issue, which by law he might avail himself of under any special plea in excuse or justification.

In this case, the evidence offered by the defendants, and refused by the Court, was not such as might bring the title of the estate in question. The evidence was only of a right or easement in the land, perfectly consistent with the plaintiff's title to it. Such evidence they were entitled to produce under the general issue, by the seventh section, above cited. Twenty years' use of an easement is a good bar to trespass. Here the defendant offered evidence of the use of the way for twenty years before the action was brought.

King, for the defendant in error, cited and relied on the case of *Spear vs. Bicknell*, (1) as decisive of the question before the Court.

Per Curiam. The defendants, in the trial of the original action, offered, in excuse of the trespass which had been proved, evidence of the existence, and of the occupation by themselves and others, of a private way in the *locus in quo*, [* 387] for twenty years before the commencement of the action.

It is true, that twenty years' occupation of a way or other easemen

(1) *Mass. Rep.* 125.

is a sufficient bar to an action of trespass. (a) But the twenty years are to be reckoned from the date of the supposed trespass, and not from the commencement of the action brought for it. So that, if the evidence had been admissible in the case, it would not have been a sufficient bar to the action.

But, whether the evidence offered would have been a good defence or not, we are all of opinion, that the defendants could not avail themselves of it, under the general issue, in this case. In *Spear vs. Bickwell*, we held an easement in the land of another to be within the provisions of the statute of 1783, c. 42, although in common parlance it be not called real estate. We still think the opinion there given to be the true construction of the statute; and it follows from it, that the defendants, in the case brought before us by this writ of error, had no right to give evidence of such an easement, unless specially pleaded. If it were otherwise, a defendant in trespass would always have it in his power, by pleading the general issue before a justice, to oust this Court of its appellate and final jurisdiction, in cases wherein it was clearly the intention of the legislature that such jurisdiction should remain to the Court.

Let the judgment be affirmed, with costs for the defendant in error.

(a) [It is presumptive evidence of a grant of the right of way, but the possession itself cannot be pleaded in bar. 2 *Stark. Ev.* 914, 2d *Eng. ed.* — *Ed.*]

C A S E S

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF CUMBERLAND, MAY TERM, 1811.
AT PORTLAND.

PRESENT:

HON. THEOPHILUS PARSONS, CHIEF JUSTICE.
HON. SAMUEL SEWALL,
HON. GEORGE THATCHER, } JUSTICES.
HON. ISAAC PARKER,

ABRAHAM PURRINGTON *versus* BEZALEEL LORING.

If an officer, having lawfully seized goods by virtue of a warrant of distress, wantonly removes them to a great distance before the sale, whereby the owner is injured, an action of the case may be maintained against him; but he is not, for that cause, a trespasser *ab initio*.

Where an officer returned, on a warrant of distress, that he advertised the goods distrained twenty-four hours before the sale, he was not permitted to give parole testimony, in an action of trespass against him for taking the goods, that he in fact advertised them forty-eight hours before the sale.

TRESPASS for taking and carrying away a calf, and a chaise and harness, the property of the plaintiff.

The case came before the Court upon an agreed statement of facts; from which it appears that the plaintiff's property in the chattels taken, and the taking and carrying of them away by the defend-

ant, are admitted ; that the defendant, being a deputy sheriff, by virtue of two several warrants of distress, issued by a justice of the peace for this county against the plaintiff, for neglect of duty as a training soldier in the militia, took the said chattels in *Falmouth*, where the plaintiff then lived ; that he put his own horse to the chaise, and, taking another person with him, rode out of the town in which he had seized them, making a considerable circuit ; that he afterwards sold the chattels in *North Yarmouth*, and re-

[* 389] turned upon the warrants of * distress, that, having kept the chattels seized four days, and the sums ordered by the warrants to be levied of the plaintiff not having been paid, nor the chattels otherwise redeemed, he sold the same at public auction to the highest bidder, " having given twenty-four hours' previous notice of the time and place of sale, according to law."

Upon these facts, it was agreed, that, if the Court should be of opinion that the defendant could be permitted to introduce parole evidence to contradict his returns upon the warrants, and to prove that he advertised the chattels at *North Yarmouth* forty-eight hours before the sale ; and if the Court should also be of opinion that all the proceedings of the defendant were correct, and amount to a legal justification — the plaintiff should become nonsuit ; and if otherwise, the defendant should be defaulted, and the plaintiff's damages be assessed by the Court.

The cause was argued at the last May term in this county, by *Longfellow* for the plaintiff, and *E. Whitman* for the defendant.

Longfellow contended that, although there was no special provision of law, requiring that chattels taken in execution should be sold in the same town where the party from whom they are taken resides, yet that such may fairly be presumed the intention of the law, from the mischiefs to be apprehended from a different practice. If not limited to the vicinity, the officer may carry them to a distant part of the county ; by which the expense would be enhanced, and where the owner may not know of the sale, and may be deprived of his legal right to redeem them ; and where the value of the chattels is likely to be less known. This last observation has peculiar strength when horses and cattle are seized, as very frequently happens.

But the objection most relied on is the want of legal notice of the sale. The law expressly prescribes forty-eight hours' notice, and the defendant gave but twenty-four. Having thus neglected to fulfil his duty, he became a trespasser *ab initio*.

[* 390] * The return of an officer is taken for true in every case, except only where an action is brought against him for the falsity of the return itself. He is not at liberty to contra-

dict it himself. And this rule is founded in great reason. Purchasers at such a sale may be deceived, and find themselves without a title to the articles they were induced to buy. The debtor himself, having from the return a sufficient cause of action, may be deprived of it, and incur fruitless expense, if the officer may at any time contradict or control by parole testimony the return he has made, and which has become matter of record.

The case finds that the defendant unnecessarily used the chaise as his own, when it was in his custody as an officer; and by thus abusing his trust, he becomes amenable as a trespasser.

Whitman was informed by the Court, that he need not notice the selling the distress in another town than that where it was taken.

As to the using of the chaise, he said, no unnecessary or wanton use appears. It is not easy to suggest a more proper method which the officer could have adopted, than putting his own horse to the chaise, to remove it to a place of safety, and where the sale could be conveniently made.

Trespass lies not against an officer but for his misfeasance. If the defendant's returns are by mistake different from the truth of fact, and the plaintiff has in fact received no injury, it is absurd that he should avail himself of that mistake to obtain damages, when the whole truth disclosed would show that he had no claim to damages. The returns themselves can never have operated to his injury. They are to be considered as the confession of the officer, and may be explained or contradicted by him, if he have evidence to support his explanation or contradiction, without violating principles of public policy, or injuring any one.

The defendant need not contradict his return, to justify himself. If he advertised the chattels forty-eight hours, * it would still be true that he advertised them twenty- [* 391] four hours. He says he advertised them *according to law*, and if so, it must have been forty-eight hours, and thus the explanation he offers, is not substantially different from the return itself.

The action stood continued for advisement; and now the opinion of the Court was delivered by

PARSONS, C. J. The action is trespass *vi et armis*, for taking and carrying away a calf, and a riding chair and harness; and it comes before us on a case stated by the parties. The property in the plaintiff, and the taking and carrying away by the defendant, are agreed.

The justification by the defendant is, that, as a deputy sheriff, he, on warrants of distress against the plaintiff, duly issued and delivered to him to execute, took, carried away, and sold, to satisfy those war

rants, the chattels mentioned in the declaration. The warrants of distress, and the authority of the defendant originally to take and carry them away, are admitted ; but the plaintiff insists that the defendant, by removing the goods seized, out of the town in which the plaintiff lived, and in which they were seized, became a trespasser *ab initio*, by abusing the authority of the law.

That the goods were removed to, and advertised and sold in an adjoining town, is agreed in the case ; but merely from that fact we do not consider that the officer has become a trespasser *ab initio*. The expense of keeping or of advertising may be not increased by the removal, and the sale may be under more favorable circumstances for the owner. If the officer had wantonly removed the goods to a great distance, thereby increasing the charges of keeping and advertising, or injuring the sale, a special action of the case might be maintained against him ; but he would not be a trespasser *ab initio*, if the goods were legally seized and carried away.

Another objection to the defendant's justification is, that it appears from his return upon the warrants of distress,
 [* 392] * on which the chattels were seized, that he sold them after having advertised the time and place of sale twenty-four hours.

As by the law the defendant ought to have made the advertisement four days before the sale, this objection is admitted to be fatal, unless the defendant can be admitted to prove by parole, notwithstanding his return endorsed on the warrants, that he in fact did advertise the time and place of sale four days before the sale.

But it is our opinion, that parole evidence for this purpose is not admissible. The officer's return must be in writing ; and when made upon his precept, and regularly returned, it must be presumed to be true, until the falsity of it be proved. He cannot therefore justify by a parole return, when it is his duty to return his doings in writing. And it may be further observed that the owner of the goods taken has no regular means of knowing whether the officer has done his duty, other than by inspecting his return ; and if the return may be explained, or another return proved by parole, this means may be useless. And it may be added, that if parole evidence was admissible, there would be great danger of fraud and perjury. But the officer, by doing his duty, in returning truly his proceedings endorsed on his precept, is liable to no inconvenience, if he has acted legally ; and if he has not, he ought not to be protected by a false return, whether in writing or by parole.

It is therefore our opinion, that the plaintiff has maintained his action, and that the defendant, pursuant to the terms of the agreement, be called.

Defendant defaulted

THOMAS WILSON *versus* BEZALEEL LORING.

Where the highest bidder at a sheriff's sale refuses to take and pay for the article he has bid off, the sheriff may set it up again, and sell it to the highest bidder on such second attempt.

TRESPASS for taking and carrying away a horse, the property of the plaintiff.

This action came before the Court upon a case stated, containing similar facts with those in the action of *Purrrington * vs. Loring*, immediately preceding. In addi- [* 393] tion to those facts, it was also agreed, in the present case, that the defendant sold the horse at auction, but the purchaser, discovering some blemish which he supposed would injure the horse, requested to be released. To this the defendant, after some resistance, at length consented; and again putting up the horse for sale, he was bid off to another person for a smaller sum than was bid on the first attempt to sell him. It was not more than twenty minutes from the time of the first sale, until he was put up the second time, and the same persons were present during the whole transaction.

Longfellow for the plaintiff.

E. Whitman for the defendant.

By the Court. Although the decision of the action of *Purrrington* against this same defendant also determines this, and it is therefore unnecessary to give an opinion as to the effect of the additional facts in this case, yet it may not be useless to observe, that where a highest bidder at a sheriff's sale refuses to take and pay for the article he has bid off, the officer has authority to set up the article again at auction, and to sell it to the highest bidder upon such second attempt. If it were not so, officers would be subjected to the most mischievous consequences.

Defendant defaulted

JOHN PERRY, JUN., *versus* THOMAS WILSON.

Where a corporation was created by law, "for making, laying, and maintaining side-booms in convenient places in ——— river," &c., it was held that they were not authorized by their incorporation to enter the close of another, adjoining the river, without the owner's consent.

Where an action is delayed for the convenience of the Court, they will take care that no party suffers by such delay: therefore, where, after a continuance by order of Court for advisement, the defendant in the action died, judgment was entered as of the former term.

THE facts in this action, which was *trespass* for breaking and entering the plaintiff's close, subverting his soil, carrying away his logs, &c., and which came before the Court on an agreed statement, are sufficiently disclosed by the *chief justice* in delivering the opinion of the Court as follows:—

[* 394] * PARSONS, C. J. This action is *trespass* for breaking the plaintiff's close, which is a part of the shore of *Androscoggin* river, in which the tide ebbs and flows, and is bounded on one side on the upland, and also adjoining to the plaintiff's flats.

The defendant justifies under, and as one of the proprietors of the side-booms on *Androscoggin* river, a corporation created by the statute of 1804, c. 107. The breaking and entering of the close, and the carrying away of the logs, being admitted, as charged in the declaration, the sufficiency of this defence in law is submitted to the Court on the facts stated by the parties.

In this statement, it is agreed, that the said corporation had, previous to the *trespass*, laid a boom on the plaintiff's said close, but without his consent, between high and low water marks; that the defendant was one of that corporation, and owner of the logs carried away; that he placed them in the said close by direction of the corporation; and that he carried them away, without paying the plaintiff any compensation for the damage done him by their being placed upon, or their removal from his close.

It was admitted for the defendant, that this invasion of the plaintiff's right of property in his close is not justifiable, unless by the provisions of the statute already referred to. In looking into this statute, the first section is the only part that is applicable to the decision of the question before us. By this section, certain persons, and their associates, are made a corporation "for making, laying, and maintaining side-booms in suitable and convenient places in *Androscoggin* river," from the bridge to the narrows; within which limits, it is agreed, the plaintiff's close is situated.

But the power thus given to the corporation will not authorize

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them to enter the close of any person without his consent, or to place logs thereon for their safe-keeping. As a corporation, they may obtain the consent of the owners of the shore, on such terms as the parties may agree * upon; but without [* 395] such consent, any person entering on the close of another, as an agent of the corporation, is a trespasser.

The legislature might have appropriated the plaintiff's close to public uses without his consent, provided a reasonable compensation had been made him therefor. But in this statute, no compensation is provided, nor any means of ascertaining or securing the payment of it declared. If, then, this act was construed to be an appropriation of the plaintiff's lot for the use of the public, such appropriation would be unconstitutional and void. Therefore, whether the corporation, under whom the defendant would justify, be created for public uses, for the particular emolument of the proprietors, or for the benefit of the counties of *Cumberland* and *Lincoln*, between which the river, at the place described, forms the boundary, the claim of the defendant to enter and occupy the plaintiff's close, as an agent of the corporation, cannot prevail; and he must be considered as having committed the trespass charged on him, and must, conformably to the terms of the agreement, be defaulted.

Defendant defaulted.

Orr for the plaintiff.

Alden for the defendant.

Note. This cause was submitted to the opinion of the Court at the last May term, and was then continued by their order for advisement. Before the present term, the defendant, *Wilson*, died. Upon this fact being suggested to the Court, judgment was entered as of the last term in May; the *chief justice* observing that where an action was delayed for the convenience of the Court, they would always take care that no party should suffer by such delay.

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* *LOIS MERRILL versus BENJAMIN PRINCE.*

The security, to be taken by a justice of the peace, of one accused as the putative father of a bastard child, must be by a *bond*, and not by *recognizance*.

THIS was a writ of *scire facias*, sued by the plaintiff to have execution upon a *recognizance* taken before a justice of the peace for

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this county, in which the defendant recognized as one of the sureties to the plaintiff, for the appearance of one *Hugh Prince* at the then next term of the Court of Common Pleas, to answer to the plaintiff upon her complaint against him for getting her with child, alleging that the child, of which she was then pregnant, if born alive, would be a bastard.

The defendant prayed oyer of the recognizance, and thereupon, by leave of the court below, pleaded five several pleas in bar, all of which resulted in demurrers or in issues in law on the record specially joined. As no decision was made on any of these, it would be useless to state them particularly; it being settled by the court that the justice was not authorized to take the recognizance in question.

The cause was submitted without argument, and the opinion of the Court was delivered by

PARSONS, C. J. The complaint made by the plaintiff to the magistrate, upon which the recognizance sued in this action was taken, is founded on the statute of 1785, c. 66, and is given to enable her to compel the putative father of her child to contribute to its maintenance when born. The pregnant woman may, under the provisions of this statute, complain to a justice of the peace, who may thereupon cause the party, accused as the putative father, to be brought before him on warrant; and on the examination of the woman, he may bind the party accused, with sufficient surety or sureties to appear and answer at the next Court of Common Pleas.

As a party may be bound with sureties as well by recognizance as by bond to the complainant, if the statute had not explained in what manner the accused is to be bound, perhaps the mode [* 397] of binding might be at the option of the * justice, unless it should on general principles be supposed to be confined to recognizance.

But there is a further provision, that if the woman be not delivered at the next court, or be unable personally to attend, the court may, unless the sureties object, order the continuance of his *bond*; which order, entered on record, shall have the same effect as a recognizance to appear at the next term.

The legislature have therefore defined the manner of binding over with sureties the party accused, to be by his bond to the complainant, and not by recognizance. And in this distinction the legislature have acted wisely. For the party or his sureties cannot be relieved against the condition of the recognizance; but they may be against the penalty of the bond. If, therefore, the recognizance is forfeited, the woman may recover the whole sum in which

the accused was recognized ; who is also, on a further prosecution, answerable, if adjudged the putative father, to contribute to the maintenance of the child. So the recognizance may be sued, if the child be still-born, or even if the party accused be acquitted of the charge against him.

But if he be bound by bond, although the condition may be broken at law, yet the Court can relieve against the penalty, on the payment of merely nominal damages, if the complaint be found false, or if the putative father otherwise give security for his contribution to the maintenance of the child ; or the penalty may be reduced, so as to cover and be a security for that maintenance.

We are, therefore, on the ground that the justice in this case was not authorized to take this recognizance, of opinion that the declaration is bad, and not sufficient for the plaintiff to have the execution therein prayed for.

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* REUBEN NASON, Guardian of APPHIA T. NASON, Appellant from a Decree of the Court of Probate, *versus* STEPHEN THATCHER AND OTHERS, Executors.

Where a corporation, created for pious and charitable uses, were made the residuary legatees in a will, its members were received as witnesses, on the question of the sanity of the testator, which was at issue between the executors and the heir at law.

THIS was an appeal from a decree of the court below, proving, approving, and allowing the last will and testament of *Peter Thatcher*, Esq., late of *Gorham*, in this county, counsellor at law. The appeal was claimed in behalf of the heir at law.

The sanity of the testator being the question, an issue was formed and tried by a jury. The executors offered two members of the *Maine Missionary* society to be sworn as witnesses. They were objected to on the part of the appellant, because the testator had, by the instrument in question, after sundry legacies, devised the residue of his estate to the said society, " for the purpose of increasing the funds of that benevolent, useful, and pious institution."

The counsel for the executors insisted that the members of the society were mere trustees to convey the testator's bounty to the objects of the institution ; and to consider them personally interested in the residue thus devised to them, was to impute the most corrupt intentions to them.

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By the Court. If this society were a party to the suit, its members could not be admitted as witnesses. But as they are mere trustees, and we cannot presume that they will abuse the trust reposed in them by the testator, their interest is too minute to admit of the supposition that it will influence them in their testimony. Let them be sworn.

A verdict being rendered in favor of the sanity of the testator, the decree of the court below was affirmed, and the cause remitted for further proceedings.

Mellen for the appellant.

Emery and *Whitman* for the appellees.

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* COMMONWEALTH *versus* THE PEJEPSCUT PROPRIETORS.

To an information for an intrusion into the lands of the commonwealth, the defendants pleaded a former judgment of this Court, in an information of the commonwealth against them, concerning the same lands, rendered on a report of referees, which report contained a stipulation that the defendants should, within six months, execute a release to the commonwealth of certain other lands, and that the judgment was entered agreeable to the report. Replication, that the six months are elapsed, and that the defendants did not, within the six months, execute the release — and held good.

THIS was an information filed by the attorney-general, May term, 1808, for an intrusion by the defendants into certain lands of the commonwealth.

The information is alleged to be brought in pursuance of a resolve of the legislature, passed February 24th, 1807, directing the attorney-general or solicitor-general to institute an inquest of office, or any other process in law, against the defendants, to ascertain *the title in the commonwealth* to revest the possession of the land on both sides of the *Androscoggin* river, above and northerly of a south-west line drawn on the westerly side of said river, from the uppermost part of the upper falls in the town of *Brunswick*; and on the east side of said river northerly of a north-east line drawn from said river, five miles above the said uppermost falls, extending up the said river to the limits of the commonwealth, holding the breadth of four miles on the west side of said river, and extending to the lands belonging to the *Plymouth* company, and *Kennebeck* river on the east side; unless the *Pejepscut* proprietors, or those to whom any part of said lands were divided, should, within six months from the passing of

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the said resolve, make, execute, and deliver good and sufficient deeds to all the settlers, agreeable to the report of commissions appointed by virtue of a resolve of March, 1801 ; and also a deed to the commonwealth, to be made and delivered agreeably to a report of certain referees ; and likewise pay to certain commissioners therein named a sum of money mentioned, with interest.

And the attorney-general further alleges that six months have elapsed since the passing of said resolve, and that neither the said proprietors, nor those to whom any part of said land was divided, have, within said term of six months, made and delivered such deeds to the settlers, and to the commonwealth, nor paid to the said commissioners the said money and interest. Whereupon he informs the Court that *the late province of *Mas-* [* 400] *sachusetts Bay*, within forty years last past, viz. on the fourth day of July, 1776, was seised and possessed of a certain tract of land in the said county of *Cumberland*, called province land, bounded north-easterly by *Androscoggin* river, south-westerly by a curve line parallel thereto and four miles distant therefrom, south-easterly by a line drawn from *Brunswick* falls westerly to said line, and northerly by a line drawn west from the uppermost part of twenty-mile falls to said curve line ; and the said province continued so seised, until succeeded by the commonwealth, who ought now to be in the actual and undisturbed possession of the same. Nevertheless, the *Pejepscut* proprietors have, within the term of twenty years past, with force and arms, illegally entered upon the said tract of land, and disturbed, and still continue to disturb, the commonwealth in the possession of the same, and have taken, and still continue to take, the profits thereof, in contempt of the said commonwealth, and against their authority and laws.

The defendants, May term, 1809, pleaded, 1. The general issue of not guilty, which was joined.

2. In bar of the information, they set forth, *in hæc verba*, a former information and process respecting the same land, sued and prosecuted against *Josiah Little*, in which, after divers continuances and proceedings, the said *Pejepscut* proprietors, with the consent of the attorney-general, became parties to the said suit ; and thereupon a rule of reference was entered, pursuant to a resolve of the General Court, by the attorney-general for the commonwealth on the one part, and by the said *Pejepscut* proprietors and the said *Josiah Little* on the other part. The resolve, granting this authority is recited in the proceedings, and requires certain stipulations and conditions on the part of the said proprietors ; particularly that they should lay out and sell to each and every settler then on the land

that might be awarded to said proprietors and *remain undivided*, one hundred acres of land, to be so laid out as should best [* 401] include * the improvements of said settlers, and be least injurious to the adjoining lands, for so much money, and on such terms as three commissioners, to be appointed by the governor and council, should judge reasonable, which commissioners were also to settle all disputes respecting the location of the lots for the settlers. The rule of submission then recites, that the said *Little* and the said proprietors consented to the said stipulation and conditions required by the said resolve; and thereupon the commonwealth, and the said proprietors, and the said *Little*, did submit to the determination of *Levi Lincoln*, *Samuel Dexter*, junior, and *Thomas Dwight*, Esquires, the said suit or inquest of office, and the claims and estate which the said proprietors and the said *Little*, or either of them, or any person claiming under them, had, or which the commonwealth had, in and to two tracts or parcels of land lying on each side of *Androscoggin* river, bounded, &c.; — This rule contained the following, among other conditions, *viz.* that if the proprietors should neglect or refuse to comply with or perform their stipulations aforesaid, according to the true meaning and effect thereof, that then the said rule, or any report that might be made pursuant thereto, and any judgment that might be rendered thereupon, should be absolutely null and void, and of no effect whatever, either in court or elsewhere, if the commonwealth should at any future time choose to consider it so; and that the nullity of the same act, resulting from such nonperformance of the said stipulations, might be given in evidence on any issue between the said commonwealth and any person claiming under the same, and the said *Little*, the said proprietors, or any person claiming under either of them; — It having been agreed, by the parties to the said suit, that the report of the said referees should be made to this Court, sitting in any county, and judgment rendered thereon as of the then next preceding term in the county of *Lincoln*, the record further contains, that the [* 402] * said referees made a report at the term of this Court holden at *Boston*, in the county of *Suffolk*, February, 1800, by which they awarded, that the title and claim of the said proprietors ought to be considered as extending, and that they shall have and hold, subject to the provisions and regulations stated in the said rule respecting settlers, all that tract of land situated in the county of *Lincoln*, bounded, &c. Also, one other tract of land, situated in the county of *Cumberland*, bounded, &c., being the same tracts which are mentioned and described in the said rule; These

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tracts the referees awarded to the said proprietors, upon condition that they should, within six months from the date of the award, by a deed of release made to the commonwealth, sufficient, in the opinion of the Supreme Judicial Court, or of the attorney-general, to bar the said proprietors from any future claims to land northerly of the said northerly boundaries of the said two tracts of land respectively, and to confirm the same to the said commonwealth, release all their the said proprietors' claims, right and title in and to the said land situate northerly of the boundaries aforesaid to the commonwealth, and should lodge the same deed within the said term, in the clerk's office of the same court, or with the attorney-general, for the use of the government: — Which said report was accepted by the same court, and it was thereupon ordered by the same court that judgment should be rendered according to the said report, as of the then preceding term of this Court, holden at *Augusta*, July 16, 1799: — It was therefore considered by the court, that the title of the said *Josiah Little*, and of the said *Pejepscut* proprietors, and of all persons claiming under them, and of either of them, in and to the land described in the said report, be confirmed to them, their heirs and assigns, agreeable to said report. The defendants then aver that the said judgment in the said record mentioned yet remains in full force, and not reversed or annulled; that the tract of land described in the said report, lying in said county of *Cumberland* and the * tract of land de- [* 403] scribed in this information are one and the same land, and not different; that the said proprietors mentioned in the said record and those mentioned in this information are one and the same, and not different; and that the estate and title claimed and set up by the commonwealth in and to the premises in said record mentioned, and the estate and title claimed and set up by the commonwealth in and to the premises described in the present information, were one and the same, and not different; all which they are ready to verify: wherefore they pray judgment if the said attorney-general, in behalf of said commonwealth, his information aforesaid thereof against them ought to have or maintain, &c.

The attorney-general replies, protesting that there is no such record; that there is not, and never was any such judgment rendered by said court; that the premises demanded in this case, not being at the time of the said supposed judgment real estate within the county of *Kennebeck*, nor sued for in a suit wherein the commonwealth was a party and the adverse party presided within the said county, the said court holden at *Augusta* had no authority by law to render judgment therefor; that the said report being conditional, no absolute judgment could be or was rendered thereon in

favor of said proprietors ; that said report, being made solely upon a condition not contained in the submission, is void ; and the judgment, being agreeable thereto, was not authorized by any law, and is of no legal validity ; and that the legislature of said commonwealth have in due form of law determined, elected, and resolved, that the said rule of submission, report, and judgment thereon are and shall be considered as null and void, and of no effect whatever, either in Court or elsewhere : — For replication says, that six months from the date of said report have long since passed, and the said proprietors did not within the said six months, by a deed of release made to the commonwealth, sufficient, &c., release, &c., as in and by the said report and judgment of confirmation they were [* 404] * required to do, as the conditions on which the tracts of land therein described were awarded and adjudged to be confirmed to them ; and this, &c. ; wherefore, &c.

To this replication the defendants demur generally, and the commonwealth, by the attorney-general, joins in demurrer.

The cause was argued, upon this demurrer, March term, 1810, in *Suffolk*, by *Bidwell*, attorney-general, for the commonwealth, and *Dexter* and *Jackson* for the defendants.

Jackson, in support of the demurrer. The judgment pleaded in bar is not in terms a conditional judgment, nor ought to receive such a construction from the Court ; for there was no power to enter such a judgment. The only conditional judgment at common law is in *detinue*, in which the plaintiff recovers the thing demanded in specie, or damages for the detainer. (1) It is true that, by our statutes, a conditional judgment is prescribed in real actions on mortgages ; (2) and in certain criminal cases, courts are authorized by statute to award a conditional sentence. (3) Judgments against executors and administrators, *de bonis testatoris si, &c. si non, de bonis propriis*, are absolute judgments, with conditional modes of execution. So our common executions, as prescribed by statute in personal actions, are all conditional.

The case, which most nearly resembles that before the Court, is of a judgment by confession with condition precedent. (4) But in these the judgment is considered as neither void nor erroneous ; although an execution issued thereon, contrary to the condition, may be set aside upon motion. Such motion, however, is always an application to the discretion of the court. Had the attorney-general taken such a course, the defendants could have shown in answer a

(1) *Vin. Abr. Title Judgment, H. 2. — Roll. Abr. Title Judgment.*

(2) *Stat. 1785, c. 22.*

(3) *Stat. 1788, c. 53.*

(4) *Vin. Abr. Judgment, I. a. 3. — 1 Salk. 400. — 6 Mod. 14. — 2 W. Black. Rep. 943*

substantial performance of the condition, and a readiness still to comply with it in point of form. Or he might, at the time, have objected to the entry of the judgment; and the court would have suspended the entry until the condition should have been performed. If, on the * other hand, he was satisfied with [* 405] the assurance of the party that it would be fulfilled, he would make no objection to judgment being entered, and the record would then stand as it now does.

The present objection goes to unsettle the records, making their validity to depend on extrinsic matter. Suppose a purchaser under this judgment had been assured by the proprietors, and also by the attorney-general, that the condition was performed, and that he even saw the deed delivered; still the record would stand as it now does; and he must afterwards prove this fact, which is *dehors* the record, in order to support the judgment.

If it is now too late for a motion to set aside the proceedings for irregularity, the attorney-general may make application for a review of the action; and, upon such an application, the defendants would show that the judgment ought to stand, upon sound principles of equity and justice. At any rate, they insist that the judgment is valid and binding until it is reversed. Let it be as defective, however, as it may, it cannot be set aside by pleading this collateral matter. If the court had jurisdiction of the cause, the judgment must be reversed by a writ of error, before the commonwealth can avoid it.

Further. If the law did in fact admit such a conditional judgment, as this is contended by the government to be, still such a judgment should not have been rendered in the case under consideration; because the award, as to that part of it, was void, as being out of the submission, though valid as to the residue, and as immaterial. The land ordered to be released was not in controversy between the parties. It does not appear that the defendants ever claimed any part of it. The attorney-general did not complain of their intrusion upon it. No evidence was before the referees respecting that land; nor, indeed, could they regularly have received any such evidence.

Bidwell, attorney-general, observed that the whole proceedings were on the record, and the Court would form their opinion upon them.

* If there was no authority in the court to render a [* 406] conditional judgment in the case under consideration, and they have in fact rendered such a one, it was void, as being *coram non judice*, and may be avoided by plea; although an erroneous

judgment within the authority of the Court to render is valid, until reversed upon error.

The case of *detinuis* shows that a judgment rendered at common law may be conditional; but in this case the jurisdiction of the Court was not derived from the common law, but wholly from the resolve of the legislature, which expressly authorized the submission to referees, and a judgment pursuant to their award, so that a conditional judgment was as well authorized here as by statute in actions upon mortgage deeds.

If the condition awarded be of a matter *dehors* the submission, the whole judgment is void. For where all that is awarded to be done by one party to a submission is void, the whole is void, and there is no award at all, and the judgment founded upon it is absolutely void.

It is immaterial whether the condition was precedent or not; for, if it was precedent, the title of the defendants never was confirmed by the acceptance of the report; and if it was not precedent, it was merely confirmed, subject still to become void, if the condition was not performed pursuant to the award.

Dexter, in reply. It is sufficient for the defendants to show that the court had jurisdiction of the cause of action, and might render a lawful and valid judgment therein. If they have rendered a judgment, having such authority, it is not to be defeated by the non-performance of any subsequent condition that may have been attached to it. Such a position is wholly inconsistent with the nature of a final judgment, whose object it is to put an end to a controversy, and to put the subject of it at rest.

Though the judgment we are considering was not in all respects a formal common law judgment, yet it is sufficient in [* 407] point of form. After an order accepting the report * of the referees, there follows the *ideo consideratum est, &c.* And as to the condition annexed, it is to be inferred, from the whole record, that it had been performed before the judgment was entered. The deed of release was to be delivered within six months from the date of the report; and that delivery was to entitle the defendants to the benefit of the award, *viz.* a judgment confirming their title. A judgment is accordingly afterwards entered, *agreeable to the report*. This is the most natural construction and explanation of the phrase; and indeed until the release was executed and delivered, it is believed that the court would not find itself authorized to render judgment *agreeable to the report*. There certainly is nothing in the whole record set forth in the bar, which should lead the Court here to believe that the deed was not delivered before the

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judgment was rendered ; or that the Court was not well ascertained of the fact. And if this presumption should be considered as unfounded—if, in fact, the deed of release has never been delivered, the commonwealth has its sufficient remedy. The attorney-general may yet move to set aside the judgment, as obtained by surprise or fraud, or he may apply for a review of the action ; or perhaps he may procure a reversal by bringing a writ of error. But so long as it remains unreversed, as it was upon a subject matter within the jurisdiction of the Court, it is valid, and cannot be avoided in the manner now attempted by plea.

But allowing the fair inference from the record to be that the judgment pleaded in bar was conditional, yet as that condition relates to a subject neither within the action nor the submission, it is wholly immaterial. The land ordered to be released was never in dispute between the commonwealth and the defendants ; no question respecting it was submitted to the referees ; they had, therefore, no authority to award concerning it ; their award respecting it was wholly void ; and the Court, in rendering judgment on that report, must be presumed to have given it no consideration, but to have rendered judgment agreeable to the *report, so far only as that report was supported by and [* 408] conformed to the submission, rejecting the rest as surplusage.

The action standing continued *nisi* from this term, the justices present at the September term in *Hampshire*, delivered their opinions *seriatim*. (The chief justice had been of counsel in the former action, and did not sit in this cause.)

SEDGWICK, J. This is a prosecution for an intrusion into the lands of the commonwealth, instituted by an information of the attorney-general, by the special order of the legislature.

The defence set up by the plea of the defendants is, in substance, that there being a former prosecution of the same kind against *Josiah Little*, they became, by consent, parties to it ; that afterwards, during the pendency of that prosecution, a resolution passed all branches of the legislature, authorizing the attorney-general, under a rule of this Court, in which the action was then pending, to submit all the controversies and disputes subsisting between the commonwealth and themselves, the *Pejepscut* proprietors, to referees, to be mutually agreed upon, if he thought it to be for the interest of the commonwealth ; which submission was to be upon such conditions, limitations, and restrictions, as the attorney-general might think for the benefit of the commonwealth and all concerned ; provided, however, that, at all events, actual settlers on the *undivided* lands, which might be awarded to the proprietors,

should be quieted in their possessions upon the terms which the resolution prescribes; that the action was referred upon that condition, enforced by a further provision expressed in the following words, "Secondly, that if the proprietors should neglect or refuse to comply with or perform their stipulations aforesaid, according to the true intent, meaning, and effect thereof, that then this rule, or any report made pursuant thereto, and any *judgment* that may be rendered thereupon, shall be absolutely null, void, and [* 409] of no effect whatever, *either in Court or elsewhere, if the commonwealth at any further time *shall choose to consider it so*; and that the nullity of the same act, resulting from the non-performance of the said stipulation, may be given in evidence on any issue between the said commonwealth, or any person claiming under the same, and the said *Little*, the said proprietors, or any person claiming under either of them."

The plea then sets forth the referees agreed upon, the submission to them, their hearing of the parties in conformity to the submission, and their award, which was, that the title and claim of the proprietors ought to be considered as extending, and that they should have and hold, *subject to the provisions and regulations* stated in the rule of Court respecting settlers, the land now in controversy, *upon condition* that they should, within six months from the date of the award, execute a deed of release to the commonwealth, sufficient in the opinion of the Supreme Judicial Court, or of the attorney-general, to bar the proprietors from any future claims to lands northerly of the northerly boundaries of the lands which were to belong to the proprietors, and to confirm the same to the commonwealth; and should lodge the same deed, within the time aforesaid, in the clerk's office, or with the attorney-general; that the referees made a report of their award to the Court, which accepted the same, and rendered *judgment* thereon; that the title of the said *Josiah Little*, and of the said proprietors, and of all persons claiming under them, and either of them, in and to the land described in the said report, be confirmed to them, their heirs and assigns, *agreeable to the said report*.

The replication, in answer to this plea, after several protestations, denies that the proprietors had made any such deed as was prescribed by the referees as a condition, on which the lands described in the award should be confirmed to them.

To this replication there is a general demurrer and joinder.

[* 410] * As the lands, an intrusion into which is complained of in the information of the attorney-general, are within the limits of the commonwealth; to resist the claim which the gov

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ernment makes, it is incumbent on the defendants to show a title to them. This they do only by the proceedings in the former action against them—the submission to referees, their award, the acceptance of it by the Court, and their judgment thereon. The judgment is *agreeable* to the report of the referees, and that report is upon two conditions: 1. That relative to the quieting of settlers on the undivided lands; and, 2. That which required a deed of certain other lands, which it is understood were claimed by the proprietors, to the commonwealth. Will a non-performance of those conditions be sufficient to prevent a title from vesting in the defendants, by virtue of the proceedings under the reference?

The submission was expressly on condition that the proprietors should, in the manner specified, quiet settlers on the undivided lands which might be awarded to them; enforced, as has been said, by a provision prescribed by the attorney-general, and assented to by the defendants, that if they should fail to comply with the stipulations which it was understood they had made, and should neglect or refuse to quiet the settlers, according to their agreement, that it should then become competent to the government, if it should so choose, to consider all the proceedings under that action, the report and the judgment thereon, as a mere nullity, and that thereupon and thereby they should become absolutely void.

It is strange that the record presents no facts satisfactory on this part of the case; but as it is understood that there is no controversy between the government and the proprietors respecting this point, I shall make no observations upon it, and especially for this reason, that I have no doubts upon the other part of the case.

The question, then, arises on the condition annexed by the referees to their report. Upon investigation, it appeared *to them that the title and claim of the proprietors [*411] “ought to be considered as extending” to the limits designated; they therefore report, that the proprietors shall have and hold the land within those limits, subject to the “provisions and regulations” stated in the rule of reference. At the same time, the referees are satisfied that the title and claim of the proprietors does not extend northerly beyond those limits; but that the lands lying northerly of them belonged to the commonwealth. The referees, therefore, with an intention to put an end forever to all controversy between the government and the proprietors, came to a conclusion, and awarded accordingly, that the proprietors should “have and hold” the land which belonged to them; to which they had “title,” provided they would release other lands, which it is understood they claimed, but to which, in the opinion of the referees, their title did not extend. This award, in the nature of a

proposition made to the proprietors, on which they had six months to deliberate, was reported to the Court, accepted by them, and a judgment rendered "agreeable" to it. It now became as certain as any proceedings could have rendered it, that the proprietors might have all the lands, to which, in the opinion of the referees, their title extended, on performing a condition, on which the referees thought it reasonable that their title should depend. The referees refused to perform the condition, and yet they claim to hold the land. Is it possible that such a claim should be founded in justice? Or are we so shackled by the trammels of positive law, or so controlled by technical reasoning, that against justice we are bound to substantiate it?

When we are endeavoring to discover what the rights of parties are, and those rights are described or defined by language, we must determine them according to the words and expressions made use of, and that in conformity to their known meaning, which must be learned from their common acceptation and application. Nor can it, in the reason of the thing, make any difference by [* 412] whom the words were *used; whether by the party himself, or by another who was authorized to decide upon the rights in question; nor can the manner of using the words, whether orally, in writing, by specialty, or, as I apprehend, by record, make a difference. We must still attend to the words, and consider them in relation to one another, and in relation to the subject matter; and if in the result we find that they have invariably one meaning, according to their universal use and application, we ought never to say that they shall execute a different and opposite purpose.

Had this been a grant of the government, in substance like the award of the referees; that is, that the proprietors should have certain lands, on condition that they released other lands within six months, and they should neglect to release, it is certain they could not hold. Again; suppose it rested on the award of the referees, and we were now inquiring what *their* meaning was; they say that the proprietors shall have and hold on condition that they shall release; can we say their meaning was, that the proprietors should hold without releasing? By what magic has the award become a totally different thing, expressing not only a different but an opposite meaning, by being accepted by the Court and recorded by the clerk? When the referees wrote their report, they certainly meant that the proprietors should not have the land, unless they made the release. The Court accept the report, and direct a judgment to be entered "agreeable to it." They certainly meant that the report and the judgment should in fact agree, should mean the same thing,

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that by looking at the report, and knowing what that meant, one might know what the judgment intended. If the former be conditional, the latter cannot be absolute.

The absurdity of giving two different and opposite meanings, the one to the report and the other to the judgment, is rendered still more glaring, if possible, from this consideration, that the Court could not, in any respect, vary by their judgment the report of the referees; their whole *power over reports [*413] being to accept, reject, or recommit them. They can neither enlarge nor diminish, being only an instrument to *execute* what the referees have previously *determined*. But here the effort is to make them execute what has never been determined by the referees.

The condition in this case is a condition precedent; and it is, without any exception, universally true, that wherever a right or benefit is to accrue on a condition precedent, whatever the nature or character of the condition may be, there the performance of the condition is indispensable to the vesting of the right, or the obtaining of the benefit. The right is always in conformity to the condition. The language is, if you will *do*, you shall *obtain*; and the effect is, that if you will not *do*, you shall not *obtain*. And this principle has been applied to the case of an award, in the reason of the application, precisely like that under consideration; with this only difference, that *there* the condition was to do a thing merely void and of no importance; while *here* the condition was of real interest. In the case of *Lee vs. Elkins*, (5) it is laid down, that "where an award consists of divers things, and one of them is *void*, and it is expressly said, that, upon the performance of the *void* thing, the other party shall do such a thing, there the doing of the *void* thing is a condition precedent, and must be averred before action against the other for not doing *his part*." To apply the principle to the case before us—had the release, which was made the condition, been ever so insignificant; had it been, in the language of the report, void; still, to give a title, or be evidence of it, it must have been performed. But here it was in nature of a consideration; if the proprietors would give up their claim to certain lands, they should have certain other lands. It was as much in the nature of a consideration, as the payment of money would have been; and it was as reasonable that it should be performed. Suppose, then, the award had been that the proprietors should have the land "upon condition that they paid a certain sum of money," and the *report had been accepted, and [*414]

judgment rendered "agreeable to it;" upon what ground of justice could they claim to *hold*, if they would not *pay*? And what difference is there as to the right, whether money is to be paid or land released?

It was said, in the argument, that the Court could not render a conditional judgment. If that were true, it would follow that in this case they could render no judgment; for it has been already shown that, in cases of judgments upon the reports of referees, the judgment cannot vary from the report; the whole power which the Court possesses being to accept, reject, or recommit the report. So that if the report be conditional, the judgment must also be conditional. And besides, were it true that the Court cannot render a conditional judgment, the consequence would be, that the act, in such a case, purporting to be a judgment, would be ineffectual and inoperative; and not that it should be made *absolute* by separating from it the condition, and considering *that* as mere surplusage; and thereby effecting that which we know the authors of the act never intended should be effected by it.

But, it is not true that courts cannot render a conditional judgment. Judgments in *detinue* are always conditional, when in favor of the plaintiff; to recover the thing sued for, or, if it cannot be found, its equivalent in damages. So, also, judgments upon mortgages are always conditional. And in *Salk*. 400, it is said, that when a judgment is confessed upon terms, it being in effect but a conditional judgment, the Court will lay their hands upon it, and see the terms performed. There is good sense in this. The party, who claims under such a judgment, shall, before he receives the benefit of it, perform the condition on which his title depends.

It seems to me that it ought to depend on the subject matter of a judgment, and the purposes to be effected by it, what should be its form. And why should a court be restrained by [*415] any artificial rule, from the power of doing *justice between parties? which will frequently be the case, and especially upon the subject of awards, if conditional judgments cannot be rendered. In the case before us, as it appeared reasonable to the referees, if the proprietors were to be secured in the lands awarded to them, that they should relinquish their claim to other lands, why should not that purpose be accomplished? Can any one now say that it was unreasonable or unjust? And if it was not, why might they not, *in form*, make the one event to depend upon the other—the title upon the release?

But it is objected, that the report of the referees says, that "the title and claim of the proprietors ought to be considered as extending, and that they shall have and hold" to the limits awarded to

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them ; that this is evidence that their title extended to the land in question ; and that this evidence ought to be considered as conclusive against the commonwealth.

To these observations an answer has already been suggested. The whole report was upon condition, and that condition an inseparable part of it running through and controlling the whole. It is as if, in other form, the report had said upon condition that the proprietors shall release to the commonwealth the lands specified to be released ; then upon the performance of that condition, their title and claim ought to be considered as extending, and they shall have and hold *so far*. It is tantamount to saying, upon condition the proprietors should pay a thousand dollars ; *then*, or upon the performance of that condition, their title and claim ought to be considered as extending, and they should have and hold *so far*. The release was in the one case as much a condition upon which, and a consideration for which, the proprietors were to be confirmed in their title, as the payment of the money would have been in the other.

But it was said, that, although it may be true that the judgment is erroneous, and might be reversed on a writ of error ; yet so long as it remains in force, it is a bar to the claim of the commonwealth.

*To this the observations, which I have already [*416] made, afford to my mind a satisfactory answer. As the report of the referees was conditional, so also was the judgment of the court, and from the nature of it, it must be conditional.

The condition is an essential and inseparable part of it, and all taken together, it affords no evidence whatever of title in the defendants. It was competent to the court to render such a judgment. The referees made a report, which, upon the face of it, did not appear improper or unreasonable ; no objection was made to it. In such a case, according to the usage of the court, they might and indeed ought to accept it, and to render judgment "agreeable to it." There is then no error, for which it could be reversed.

For an obvious reason, it was proper that the report should have been accepted, when it was presented to the court ; and the court ought not to have delayed acting upon it, until a release was given by the proprietors ; for until the report was accepted, the proprietors could not know whether it ever would be ; and as discreet and cautious men, they might deem it an act of imprudence to release their title to lands at a time when it would be uncertain whether they should ever get an equivalent for it. It seemed, therefore, proper to decide on the acceptance of the report, to give them an opportunity of determining whether they would accept the lands

awarded to them, by the performance of the condition, which was to be within six months from the date of the award.

I think the whole difficulty in this case, which indeed has never struck my mind with much force, has arisen from confounding judgments rendered on the report of referees, with judgments given according to the ordinary course of the common law.

By the common law, in cases of arbitrament, the arbitrators may award such acts to be done by the parties respectively, as may consist with the justice of their claims. They may award [*417] money to be paid, or specific acts to be done ; *and this either *absolutely* or *upon condition*, as they may judge right. By the statute of 9 & 10 Will. 3, c. 15, in cases where awards are to be enforced by attachments, the arbitrators have the same power as in other cases ; and they may, of course, direct money to be paid, or a specific act to be done, upon a condition precedent. If the condition be performed, the party is entitled to his remedy.

We have two modes of submission to arbitration, besides those authorized by the common law ; the one by entering into a rule for that purpose before a justice of the peace, and the other by a reference of an action depending in court, which may, besides the action pending, comprehend such other demands between the parties, as they may agree upon. In both kinds of submission, the award of the referees is reported to the court. If the report be accepted, the consequence is a judgment in conformity to it. There can be no variation from it. The referees have all the power of arbitrators in other cases. They may award money to be paid, or a specific act to be done ; and in either case it may be *absolute* or *conditional*. If money only is awarded to be paid, *as then due*, an execution may issue, as in other cases. If the judgment is prospective, by directing money to be paid *in futuro*, or a specific act to be done, the remedy is either by attachment, or by action on the judgment ; and if a benefit is to accrue, or a right is made to depend, on the performance of a condition ; if the condition be performed, the party is entitled to the same remedies, to enforce the award ; but if it be not performed, the benefit or right does not accrue.

I have always supposed that these principles were undoubted. There is nothing in this case, to take it out of the influence of these principles. The referees were arbitrators elected by the parties ; they had all the powers of arbitrators in other cases : they made a report upon a condition, which they thought reasonable ; and which

I think I am bound to deem so : the performance of the [*418] condition *was to precede the vesting of a title in the defendants : it has not been performed : the report was

accepted by the court, according to the terms of it; and the judgment was "agreeable to the report," and indeed could not vary from it. The consequence is, that there is no title shown on the part of the defendants, and that, therefore, on this issue the commonwealth is entitled to judgment.

PARKER, J. (after reciting the substance of the information, and the pleadings thereon to the demurrer and joinder.) The question then before the Court is, whether the replication is good, or, in other words, whether the non-performance of the condition stated in the report renders nugatory the proceedings of the court upon the report of the referees, so that the defendants cannot by law avail themselves of the same, as a judgment to bar this or any future information for intrusion upon the same lands. The question therefore will be seen to be, whether the record, as set forth, shows a judgment upon the title in favor of the defendants. For if it does, I know of no principle, by which that judgment can be avoided by plea, as is attempted in the present case; it being well settled, and upon sound principles, that the judgment of a court of competent jurisdiction is conclusive upon the subject matter between the same parties, although such judgment may be manifestly erroneous, and although, upon a writ of error brought, it may be clear that such judgment would be reversed.

In the case before us, the proceedings, after the submission to referees, were not according to the course of the common law; but the court exercised a particular jurisdiction, given to them by the resolution of the General Court, which authorized the submission, and the agreement of the parties pursuant to that resolution. The Court had no authority to give a judgment contrary to, or different from, the report of the referees; or to dispense with any terms or conditions within the authority of the referees to require of either of the parties; so that, if the act of the court, which is considered by the defendants to be a judgment, did confirm * their title to the lands upon principles not authorized by [* 419] the submission and the report, that act would be void, as not within the authority or jurisdiction of the court.

The condition stated by the referees, was undoubtedly intended by them to be a condition precedent; and the terms, in which it is expressed, clearly show it to be so. For, after describing the lands intended to be confirmed to the defendants, and the opinion of the referees upon the title, they conclude by awarding them to the defendants upon the condition expressed, stating the time within which that condition is to be performed. There can be no doubt that the referees intended that, unless the condition was performed within the time assigned by them, the defendants should not

avail themselves of their report to strengthen their title to the lands.

Now, had the court entered a general judgment, according to the common law that the commonwealth should take nothing by their writ, and that the defendants should go thereof without day, this could not have been good, except upon the presumption that the condition had been performed, or that the condition was unlawful or void. But no such judgment was entered. On the contrary, the court confirm the title, *agreeable to the report*; thus adopting the condition, and either making a conditional judgment, never to operate but upon performance, or, in fact, doing nothing but giving judicial sanction to the report of the referees.

To attempt, therefore, to set up these proceedings as a bar to the present suit, with an admission that the condition has never been performed, is to act in direct opposition to the will of the referees, as expressed in their report, and to the opinion of the court, as found in the record of their proceedings.

It being clear to my mind, that the record does not show such a judgment as is conclusive, while it remains unreversed, [*420] but that it may be avoided by any facts existing in * the pleadings, which show that it ought not to stand as a bar to the commonwealth's present suit, — I am now to consider whether the matter contained in the replication is sufficient to destroy its effect. Undoubtedly, a submission, so solemnly entered into, of the dispute respecting the land which is the subject of the present suit, with a report of the referees thereon, sanctioned and adopted by the court, ought to be conclusive between the parties, as far as they were intended, and as far as they can be legally construed so to be. It has therefore been contended by the defendants, that so much of the report as relates to the condition is bad, being not within the authority of the referees, according to the submission, and that the report is good for the residue; which, being a confirmation of their title, is enough for the defence against this action.

That an award, to which a report of referees is analogous, may be good in part and bad in part, is a received doctrine in the law of arbitrament and awards. And the courts here have conducted on like principles, in accepting reports of referees under a rule of court, or under the referee law of this commonwealth.

But there is an exception to this general rule, as well settled as the rule itself, which is, that, when the bad part of an award was apparently intended by the arbitrators, as the consideration of the other part, which is good, the whole shall be set aside, and become void. And the reason is, that otherwise that which was intended to be mutually beneficial will operate to the advantage of one of the

parties only. If such an award should be executed, manifest injustice would be done; for the equivalent intended by the arbitrators could not be enforced, being contrary to law, and void.

This doctrine is clearly established in the case of *Pope vs. Brett*, 2 *Saund.* 293, and in note 1, to that case. Also in 1 *Roll. Abr.* 259, *pl.* 9, 10. So that, if the condition expressed in the report set forth in the record before us is void, because the subject matter of it was not within the *authority of the [* 421] referees, as contained in the submission, then is the whole report void; it being clear that the release awarded to the commonwealth was intended as a consideration for the confirmation of the land, described in the report, to the defendants.

But I am not satisfied that the conditional part of the report was in itself bad. It is true that the title to the two tracts of land described in the submission was the subject referred; but it is also true that the information, suit, or inquest of office, was submitted to the referees. Now, it does not appear by the record, that the land described in the information is the same which is described in the submission. Indeed the descriptions are different. If the land demanded in the information extended northwardly of the land described in the rule of submission, it was within the cognizance of the referees, and might properly be the subject of the release from the defendants. That it did so extend, appears probable from an examination of those different descriptions. But it is not necessary, in my opinion, to ascertain this fact; as, from the principle before discussed, it appears evident to me, either that the report is bad in the whole, and is not helped by the acceptance of the court, or that it is good in the whole; and therefore the conditional part is operative to defeat the defendants' claim under it, if the condition has not been performed.

I am therefore of opinion, that no such judgment is shown in the plea, as bars the commonwealth's right to prevail in this suit; but that the same is sufficiently answered by the fact set forth in the replication.

I cannot conclude this opinion without remarking upon several resolutions, which have been passed by the legislature during the pendency of this question before the Court, calculated, although I presume not intended, to produce an effect upon the Court, at least so far as to hasten the decision. The question is involved in some intricacy; and not more time has been taken to deliberate upon it, than is usual in regard to questions of importance. Yet the attorney *general has been twice required by [* 422] the legislature to inquire into the causes of the delay, and by the last order to report the reasons, *if any exist*, why judgment has not been rendered.

Knowing, as I do, that this suit is prosecuted in the name of the commonwealth for the benefit of individuals, who are settlers on the land in question, I can have no doubt that this importunity has been caused by the applications of those individuals, or their friends, who may think them aggrieved. It is to be regretted, however, that the language of the resolution, which passed in June last, had not been more attended to; for it carries with it a strong implication, that the legislature had cause to believe there had been some extraordinary and unjustifiable causes, which operated a postponement of the decision of this action. Now, it being of the last importance to the character of the judiciary, and indeed to the interests of the people, that the courts should not only be incapable of being affected in their opinions, even by a manifest indication of the will of the legislature, but should not even be suspected of yielding to such an influence, I deem it my duty, since the judgment of the Court in the case now before us is in favor of the commonwealth, wholly to disavow any view to the probable wishes of the legislature upon the subject, and to declare my firm belief, that such interference would be wholly without effect upon the mind of any one member of the Court.

SEWALL, J. (stated the substance of the information and pleadings, and proceeded thus.) The question immediately suggested by this demurrer is, the sufficiency of the replication in behalf of the commonwealth, to avoid the plea in bar, or answer of the defendants, to the complaint of intrusion on certain lands of the commonwealth, according to the information filed against the defendants.

Anciently, to an information of intrusion in behalf of the sovereign, brought against a subject, the latter was required to answer [* 423] by showing his title specially; but in several * modern decisions, this prerogative has been relaxed in favor of the subject; and to an information he is permitted to answer as he might when impleaded at the suit of a fellow-subject, by a general denial of the charge of intrusion. This process is in the nature of an action of trespass, and to maintain an information of intrusion in behalf of the sovereign, a title and right of possession are to be proved, as would be required of the plaintiff in an action of trespass. It is sufficient for the defendant, in a process of intrusion, to show a title to the possession; and a judgment in his favor, in a former complaint of intrusion respecting the same tract of land, amounts at least to a title to the possession, when that is again questioned by the same party. (6)

(6) *Com. Dig. tit. Prærog. D. 74. — Mo. 370, 376. — Hard. 230*

A verdict is competent evidence, upon a question of fact or of title, when between the same parties the same question is again put in issue in another action. It is also a salutary maxim of the common law, *Nemo bis vexari debet pro una et eadem causa*. The justice and equity of this maxim, and its importance to the peace and welfare of the community, will not be disputed. A verdict, however, is not *incontrovertible* evidence, unless it is sanctioned by a judgment rendered upon it, which continues in force; and to a plea of a former action in bar of a subsequent suit for the same cause, it is essential, either that the action pleaded is then pending, or that a judgment was rendered upon it, which remains in full force at the time of the plea pleaded.

A verdict is conclusive evidence, between the same parties, upon the fact decided; and a former judgment is a bar to a subsequent suit upon the same cause of action; even when the judgment rendered upon the verdict, or the judgment offered in bar of a subsequent action, are liable to be arrested for want of form, or to be avoided by writ of error. (7)

A report of referees, accepted by a court of competent jurisdiction in the subject matter, where a judgment has * been rendered upon it; and also judgments rendered [* 424] upon the awards of referees, according to the immemorial usage in the courts of common law within the territory of this state, have, while they continue in force, the same conclusive effect in subsequent actions and inquiries, where the same complaints and demands are put in issue between the same parties, which verdicts and judgments thereon are allowed to have.

These rules of law, which I have stated, I believe, upon sufficient authority, have not been questioned or disputed in the argument of the case at bar; and indeed the replication in behalf of the commonwealth supposes the sufficiency of the plea and answer of the defendants, if it is not avoided by the fact alleged, which is to be taken as confessed by the demurrer; namely, that the defendants did not, within the time prescribed in the report of the referees, make and deliver the deed of release required of them by the conditional words annexed to that report; and the inference from this alleged failure is, that the judgment rendered upon that report became thereby null and void, and that, at the time of the plea pleaded, the report of the referees, in the former process of intrusion, is not to be considered as a confirmation or evidence of title, or as decisive of the present suit, although between the same parties; nor are the present defendants to be considered as impleaded in a cause of

(7) *Com. Dig. tit. Evidence, A. 5. — 2 Rol. 46. — 1 Str 308.*

action once decided between them and the commonwealth ; because, since the failure of the release required of the defendants, there has been no judgment on the award, or in the suit and process stated at large in their plea. The form existed, but without any substance of a judgment, since the six months from the date of the award expired, no sufficient release having been made and delivered by the defendants within that time.

To show the nullity of the judgment, upon which the defendants rely in their answer or plea, as sufficient to protect them against the present information for the same cause, various errors [* 425] in the record and proceedings, and * in the supposed judgment rendered thereon, have been suggested and argued ; but the reliance of the late attorney-general was principally upon the conditional words annexed to the report of the referees, and on the failure of the defendants respecting the deed of release to be executed and delivered within six months from the date of the award.

To the suggestion of errors one general answer has been given on the part of the defendants, which I have thought sufficient, after a careful examination of authorities

Whether the judgment pleaded was rendered at the proper term of this Court ; — Whether it is erroneous, as not being in the form of judgments usually rendered in the courts of common law ; — Whether courts of common law have competent authority to render a conditional judgment in cases brought before them by informations for intrusion upon the lands of the commonwealth ; — whatever may be the ground of the judgment, or the course taken to effect a decision of the controversy, are inquiries which I shall not now undertake to decide ; for, as to all these, and other like objections, this answer has been, and may legally be given, that, however sufficient the supposed errors may be to render a judgment voidable, or to avoid it, if appearing on a writ of error, and to produce a judgment of reversal ; yet no one of them, nor all of them together, can have the effect of rendering the judgment of a court of competent authority, in the case decided, *null and void*.

The effect of the conditions annexed to the award, upon the judgment ordered to be rendered *according to the said report*, and entered as a judgment that the title, &c., *be confirmed, agreeable to said report*, is the inquiry to which we are led by the replication to the plea in bar.

Different opinions may be entertained upon this question, I would hope, without any manifest absurdity or want of discernment. In the first place, is this judgment to be construed a conditional judgment ? Two instances have been mentioned of judg-

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ments said to be conditional, which this *Court is com- [* 426] petent to render. One of them is in an action of detinue, where the proceedings are by the course of the common law, admitting of an alternative judgment, which may be called a conditional one. The other is in an action of ejectment, brought upon a mortgage, for the purpose of foreclosure, where a conditional judgment is directed, the form and effect of which have been prescribed by a statute providing in that case; and this is more properly a condition in delay of the execution, than a suspension of the judgment.

But the instances, if at all applicable, seem to be exceptions, rather than examples or proofs of a general rule. In other cases, and more particularly in a judgment consequent upon the decision of a litigated title, where the tract of land in controversy has been awarded, as his fee and right, to one, in exclusion of the other; not as a bargain or compromise, or upon any special contract between the parties, or as a title accruing upon their mutual stipulations, but as existing in fact and in law, when the controversy commenced respecting it, a conditional judgment seems to be practically unnecessary, and to involve many difficulties and absurdities. In the case at bar, for instance, the authority of the arbitrators was restricted to the two tracts of land which were finally awarded to the *Pejepscut* proprietors, and to an inquiry whether the title to those lands was in them or the commonwealth. The award of a release respecting another tract of land, not included in the submission, must be considered as justifiable only upon their authority to determine the suit and inquest of office, as it is styled in the proceedings. It is therefore impossible, unless we suppose an assumption by the arbitrators of an authority not within their commission, to consider the award in question as a compromise for the commonwealth, or as a grant of title to the *Pejepscut* proprietors upon the condition prescribed to them; certainly not upon the comparatively insignificant consideration of a formal release by them respecting lands, their claim to which, if they pretended any, had been in a *manner voluntarily relinquished by the terms [* 427] of the rule to which they had acceded.

It may be, that the conditional words annexed to the award ought to have prevented a final judgment upon it, until the stipulation had been fulfilled; and if this had been neglected or refused, or the fulfilment within the time prescribed had been prevented by any inevitable accident, a recommitment of the award might have been a remedy within the discretion of the Court, to be exercised for the purposes of equal justice to the litigant parties, and to obtain an explanation from the referees, as to the period of six months

how far it was essential to the title of the *Pejepscut* proprietors in the lands awarded to them, or to the determination of the suit.

For the purposes of fair and equal justice, a remedy of this kind seems peculiarly requisite, where the party recovering the award was holden by stipulations to his disadvantage, to be enforced in consequence of the recovery : such, for instance, was the stipulation on the part of the *Pejepscut* proprietors, to release certain parcels of the tract of land awarded to them, which were in the occupation of settlers, for prices to be determined by commissioners. This stipulation has been, it is said, exacted on the part of the commonwealth, in consequence of this award, and fulfilled on the part of the defendants ; and they have given releases of title to settlers, for inadequate considerations, as the defendants estimate the lands released ; and the deeds of the defendants are not, perhaps, to be recalled or avoided, although given or exacted, in part at least, upon considerations which will fail entirely, if this award and judgment are void or voidable.

It may be answered, that these inconveniences are incurred upon the proprietors upon their own neglect to tender a sufficient deed of release within the six months, according to the terms of the report. But this is said, on the other hand, to have been an accident, and not a voluntary default.

[* 428] *The facts are not before us upon the allegations of this record, and it is not important to decide the actual state of the case in this view of it. It is enough for the argument I would rest upon, that these consequences are possible, upon the supposition of a conditional judgment, closing the suit to one party, and leaving it open to the other, to be avoided by a matter *in pais*, and a future election.

If the condition is restricted to the award, and the judgment may be understood as entered, either upon a waiver of the condition, or upon an opinion, that the conditional words annexed to the report were not intended to operate to prevent the final judgment, the judgment may indeed be, in this view of the case, unwarrantable. The court may be considered as having exercised their authority erroneously. But the judgment of a superior court may be erroneous, when it is not void, or voidable by plea in a collateral action, but only by writ of error.

The condition expressed in the report is not, as I apprehend it, included in the terms of the judgment. The confirmation by the consideration of the court is to be according to the report ; but it is not a necessary construction, that this was to be subject to a condition, which is neither a consideration for the title, nor a limitation

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of it, in the lands confirmed by the report. And if a conditional judgment is, in a case of this kind, irregular and erroneous, to construe the judgment in question as conditional upon doubtful words, would be contrary to the presumptions and rules of construction, usually applied to judgments, as well as deeds, that doubtful words are to be taken favorably in preservation of the subject matter; *ut res magis valeat quam pereat*.

However, even if the condition, notwithstanding these objections, is to be carried into the judgment, still my opinion is, that the neglect of the condition did not operate to render the judgment void, but only voidable. This seems to have been the apprehension of the late Governor *Sullivan*, while attorney-general; and this apprehension * must be considered as adopted and [* 429] confirmed by the legislature, in their resolve proposing the acceptance of a release from the *Pejepscut* proprietors, after the expiration of the six months, upon certain stipulations foreign to the present inquiry, and remote from the original stipulations made either by the parties or the referees. Proposals of this kind were idle and nugatory, if the judgment became void by the failure, on the part of the *Pejepscut* proprietors, to deliver a release. For a void judgment is not to be established or restored by any consent or agreement of the parties; but construed as voidable, all the proceedings and proposals consequent upon the award and judgment were consistent and proper.

For another reason, too, which has appeared to me conclusive on this question, I am against considering the judgment pleaded by the defendants as annulled by their neglect to perform the condition supposed to be annexed to it. A void judgment is nothing; it established no fact, position, or right, upon which either of the nominal parties can validate any claim, exemption, privilege, or beneficial interest. It is, therefore, contradictory, as I apprehend the matter, to say that a judgment is annulled and void, at the election of one of the parties to it. A judgment is sometimes voidable at the election of a party to it; but to be void, there must have been, in the formation of the supposed judgment, some want of jurisdiction, or other original defect; so that, according to the rules of the municipal code, it had never had a legal being.

The doctrine that a judgment becomes void, by the neglect of one of the parties to perform a condition annexed to it, may, in a case that may be supposed, operate to the injury of the party for whose benefit the condition was reserved; and the party neglecting the condition may thus avail himself of his own wrong or default. In the present case, the replication for the commonwealth supposes

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an election on their part to avoid the judgment pleaded by the defendants. But if the judgment, upon the exception [* 430] * to it, became only voidable at the election of the commonwealth, and not void, the plea is insufficient; for a voidable judgment continues incontrovertible evidence, between the parties to it, of the facts decided by it, and is a bar to another suit upon the same cause of action, until reversed.

Such was the opinion of this Court in the case of *M'Neil vs. Bright & Al.*, (8) when the decision was in favor of the commonwealth, and their title was maintained upon a judgment supposed to have been rendered after the law, authorizing judgments of confiscation, had been annulled by a national treaty. In that decision it is expressly stated, that "instances, in which judgments of court are void, and may be so considered without reversal, are only where, from the judgment itself, it is apparent that the court itself had not any jurisdiction; but had exercised that which belonged to another tribunal."

The general rule of law is, that the judgment of a superior court is not void, but voidable only upon a writ of error. Thus, where, by an act of parliament, a special subordinate jurisdiction was established, and, to preserve it, provision was made that the judgment of a superior court, in a suit brought therein upon any matter within the special jurisdiction then established, should be *void*; yet, respecting a judgment rendered in the Common Pleas at *Westminster*, in a suit brought there upon a matter within the special jurisdiction established by the statute, it was determined that the judgment could not be avoided collaterally, but that it was only voidable by plea or error. (9)

Now, in the case at bar, the strongest implication that can be imagined to arise from the condition annexed to the award, accepted and made the foundation of the judgment pleaded by the defendants, is not stronger than the words in the act of parliament referred to in the case cited; — that the judgment in the case provided for should be void; yet, in that case, a judgment within the provision of the act of parliament became only voidable, and was not to be arrested by a collateral plea, but only by a plea or writ of error.

[* 431] * The authority of these decisions has appeared to me conclusive on the only question now to be decided — the sufficiency of the replication; and that is insufficient, if, notwith-

(8) 4 *Mass. Rep.* 303, 304.

(9) 2 *Salk.* 674, *Prigg vs. Adams & Al.* — *Hall vs. Biggs*, 1 *Inst.* 259.

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standing the exception there suggested, and the other exceptions argued, the judgment pleaded by the defendants has effect until reversed and avoided by a writ of error.

Perhaps, upon a writ of error, it would be found that this Court is competent to revise the former proceedings, and to institute a *melius inquirendum*, if I may use the term, in case the judgment rendered on the award should be found to be erroneous, or voidable, for the neglect of the defendants; notwithstanding the assumption of it as a valid judgment, and the seeming assent to it, in the subsequent proceedings of the legislature in the appointment of commissioners, and in procuring an adjustment for certain settlers, at the expense of the defendants, or of those claiming under them.

I am not prepared to say that the requisitions of the legislature on this subject, stated in their subsequent resolves, are not perfectly reasonable and just. Lands supposed to belong to some persons claiming under the *Pejepscut* proprietors, and lawfully holden by their allotment and partition, before this controversy commenced, are required to be released by the *Pejepscut proprietors* to certain occupants and settlers. This may be justifiable upon motives of policy. These extraordinary efforts of the legislature to obtain confirmations of the possessions and improvements of settlers, ought to be more readily complied with by the parties interested. But how far it is practicable for the *Pejepscut* proprietors to make or procure the confirmations and releases required of them, respecting the lands *divided*, as well as the lands undivided, when this controversy commenced, may be a question deserving some consideration.

However, in whatever form a revival of the proceedings to determine this important controversy may be had, it is desirable that equal justice may finally obtain, and be established * for the commonwealth and all concerned; without any [* 432] detriment to those established rules and principles of law, upon which all, who have titles and recover judgments, are disposed to rely; and upon which the quiet and repose of the community at large must depend. *Interest reipublicæ ut sit finis litium.*

Replication adjudged good.

WILLIAM GODDARD *versus* NATHAN W. CHASE.

Iron stoves fixed to the brick work of the chimneys of a house are a part of the house, and pass with it, on the extent of an execution upon it.

THIS action was trespass for breaking and entering the plaintiff's house in *Standish*, and taking from the chimneys of said house two cast-iron stoves, the property of the plaintiff, in the same house being, and tearing, pulling down, and demolishing the fire-places in said house, &c.

The cause was tried upon the general issue, with liberty to give any special matter in evidence, at an adjournment of the last May term in this county, before *Thatcher, J.*, and a verdict taken for the plaintiff, subject to the opinion of the Court upon the following facts reported by the judge : —

The stoves were taken, as stated in the plaintiff's declaration. The dwelling-house, from which they were taken, had previously been set off to the plaintiff, as the property of the defendant, by appraisement, to satisfy, in part, an execution which the plaintiff held against the defendant. The house had been built and occupied many years, but the stoves had not been placed in it more than six months before the extent of the said execution. The defendant being absent on a journey when the execution was levied, upon his return went into the house, to take away sundry articles of furniture, and at the same time took and carried away the said stoves. The appraisers, appointed on the levying of the execution, considered the stoves as fixtures belonging to the house, and made their appraisement accordingly.

Kinsman, for the defendant, cited the case of *Harvey vs. Harvey*, (1) where it was adjudged that iron backs to
[* 433] * chimneys, among other things, belonged to the executor, as personal estate.

Storer for the plaintiff.

Per Curiam. There can be no doubt that these stoves were a part of the house, and passed with it to the plaintiff by the levy of his execution; and so it appears the appraisers considered them. The defendant, then, had no right to sever them from the freehold; and in doing it he was a mere trespasser. (a)

Judgment on the verdict. (2)

(1) 2 Str. 1141.

(a) [There can be no doubt that the stoves were not fixtures. — Ed.]

(2) Vide 4 Co. 62, *Herlakenden's case*. — 1 Salk. 368, *Poole's case*

 PORTLAND BANK vs. STORER.

 THE PRESIDENT, DIRECTORS, AND COMPANY OF THE
 PORTLAND BANK *versus* WOODBURY STORER.

It is not usurious in a banking company to take their notes payable in *Boston* money, and, upon renewal of such notes, to take a premium equal to the difference between that and other money.

Nor is such a transaction within a prohibition in their charter to use their moneys, &c., in trade or commerce.

ASSUMPSIT by the plaintiffs, as endorsees of an order bearing date September 25, 1809, drawn by the defendant, for the sum of 859 dollars 74 cents, on *G. Bradbury, Esq.*, as president of the *Maine Fire and Marine Insurance Company*, in favor of *Joseph Swift*, cashier of said bank, and by him endorsed to the plaintiffs.

The cause was tried on the issue of *non assumpsit*, before *Thatcher, J.*, at an adjournment of the last May term in this county; when the plaintiffs proved that the order was drawn by the defendant, was duly presented to the drawee for acceptance and payment, that both were refused, and that notice thereof was duly given to the defendant.

The defendant proved by the cashier of said bank, that the order was given for the amount of certain sums claimed by the plaintiffs as interest on certain promissory notes, which had been previously given by the defendant to the plaintiffs, for moneys loaned by them to him, and discounted at said bank; six of which notes were made and renewed several times, and discount paid under the following circumstances, *viz.* The notes were made payable in sixty days from date, in *Boston* money; and afterwards two or three * of them, on renewal, were made payable in sixty [* 434] days, and a memorandum was made on the back of each, purporting that they were to be paid in *Boston* money; that, when the respective times appointed for payment of said notes arrived, the defendant offered, and the plaintiffs received of him one per cent. for the difference in value between *Boston* money and other, or foreign bills. Said notes were so renewed at said bank a number of times, the defendant not paying specie or *Boston* money, according to the terms of the promises or the memorandums.

The plaintiffs proved that the defendant was one of the directors of the bank at the time of these transactions; that the difference in value between *Boston* money and foreign bills was two per cent at the times when the defendant paid but one per cent. on the renewal of his notes as aforesaid; that the situation of the bank, at the times above referred to, was such as to induce the directors to take their notes, in many instances, payable in *Boston* money, to

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enable the bank to redeem their bills when presented for payment; there being frequent runs upon the same from the *Boston* banks.

It was further in proof, that the loans aforesaid were made in manner aforesaid, at the request of the defendant; that the bank purchased of the defendant and others *Boston* money at one and two per cent. advance; and that the generality of banks did the same.

The counsel for the defendant contended, at the trial, that upon the foregoing facts the said order was void, either as being usurious, or as being taken under such circumstances, and in such a manner, as was not warranted by the act incorporating and establishing said bank.

But the judge, who sat in the trial, instructed the jury, that upon the above facts the plaintiffs were entitled to recover, and a verdict was accordingly returned in their favor.

The defendant's counsel filed exceptions to the direction of the judge, and the action stood over for the consideration of the exceptions.

[* 435] * And now, at this term, *Mellen* and *King*, of counsel for the defendant, argued in support of the two points made at the trial.

1. That the consideration for the order was usurious, and for this they cited the cases of *Fisher vs. Beasley*, (1) and *Commonwealth vs. Frost*. (2)

2. That the corporation had no authority by their charter to speculate, in the manner proved at the trial, upon the different species of money current in the market. They are expressly prohibited by the second fundamental article, contained in the act incorporating them, (3) from vesting, using, or improving, any of their moneys, goods, chattels, or effects in trade or commerce. It is true, they are authorized to loan and negotiate their moneys and effects by discounting on banking principles. What those principles are, neither the common law nor any statute have defined. But it seems to be very foreign from them to speculate on the various currencies of the country; and especially under this pretence to exact a premium in addition to the interest they are allowed to demand. If this practice is sanctioned by law, it is impossible to fix a bound to their exactions.

Longfellow and *Southgate* for the plaintiffs.

By the Court. (except *Sewall*, J., who did not hear the argument.) There seems no ground for the defence on the ground of

(1) *Doug.* 235.

(2) 5 *Mass. Rep.* 53.

(3) *Stat.* 1799, c. 4.

usury. The defendant might have discharged himself by paying the money due by his promises, which were to pay in cash. As the transaction did not in itself import usury, if the defendant thought it merely colorable, he should have put it to the jury to decide. There is as little ground in the second point. The construction of the statute contended for is too narrow. We all remember the runs upon the banks in this section of the state. It was competent to the directors, and but the use of due discretion, to make their loans on such terms as should enable them to meet such demands.

Judgment on the verdict.

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* CLARISSA MINOT & AL., Administrators, *versus*
CORNELIUS DURANT.

Where one had hired a vessel for a voyage, and by the charter-party had contracted to pay a certain sum per month for the hire during the voyage, it was held that the hire was payable while the vessel was detained in port by an embargo laid by the government of the *United States*.

THIS was an action of *covenant broken*, brought by the plaintiffs, as administrators of the goods and estate of *Thomas Minot*, deceased, upon a charter-party of affreightment, dated the 3d of November, 1807, whereby the defendant hired of the said *Thomas* and others the brig *Fortitude*, on a voyage from *Portland* to *St. Croix* and back to the *United States*, thence to *St. Croix* and back to the *United States* twice. The defendant covenanted to pay for the hire at the rate of 1,75 cents per ton per calendar month, during the time the said brig should be so employed by him, deducting therefrom the time of making any necessary repairs during the voyage.

The action came before the Court upon an agreed statement of facts to the following effect:—

The charter-party was duly executed on the day it bears date. The brig was loaded by the defendant, and, on the 15th of the same November, sailed for *St. Croix*, where she arrived and discharged her cargo, and from thence sailed for *Wilmington*, in the state of *North Carolina*, where she arrived on the 12th of January, 1808, and took on board a cargo of lumber, completing her lading on the 4th of February following, on which day the crew of the brig.

except the master and cook, were discharged by the defendant, the vessel being detained from that time until the 15th of March, 1808, by the embargo laws; the master and cook, during that time, were employed by the defendant in taking care of the vessel. On or about the 16th of March aforesaid, a new crew having been shipped, she sailed for the *West Indies*, and continued in the service of the defendant until the 3d of October, 1809, when she was discharged at *Portland*.

The plaintiffs' intestate was owner of six sixteenth parts only of the said brig, and they claim in this action that [* 437] *proportion of the hire thereof, computing from the commencement to the termination of the voyage, it being understood that the owners of the remaining ten sixteenth parts, in their adjustment with the defendant, deducted from the charge the hire during thirteen months and twelve days, while the brig was detained at *Wilmington*.

It was agreed that the Court should enter into judgment for such sum as, on these facts, they should be of opinion was due from the defendant to the plaintiffs; and the principal question submitted to the Court was, whether the plaintiffs were entitled to recover the hire during the time the vessel was so detained by the embargo.

Whitman, for the defendant, contended that an embargo was, in its nature, and *ex vi termini*, but a temporary suspension of commerce, whatever may be the terms of the act or ordinance which imposes it. Such was the universal impression as to the embargo, which gave rise to the present question. So, also, was it held by the Supreme Court of the state of *New York*, in the case of *M^r Bride vs. Mar. Ins. Company*. (1) And in the case of *Hadley vs. Clarke*, (2) an embargo laid "until the further order of council" was considered by the Court of King's Bench as temporary. The effect of such a temporary restraint upon trade is to suspend the operation of a contract during its continuance. This was the purport of the decision of *Hadley vs. Clarke*.

Hopkins for the plaintiffs. The defendant might have protected himself against this demand, by an exception in his contract, as he did in case time should be lost by repairs of the vessel, and as he also excepted the danger of the seas. Here, as the event proved, the danger on land was more serious than that of the seas. But when he found himself prohibited from a foreign voyage, he might have employed the vessel, of which he was *quasi* owner, in the coasting trade, which was not prohibited. Or he might have

(1) 5 *Johns. Rep.* 308.

(2) 8 *D. & E.* 269. — See, also, *French Ordinances*, Liv. 3, Tit. 1, Art. 5.

rescinded the contract, and delivered the vessel to the owners, who would have so employed her. The case *of [* 438] *Hadley vs. Clarke* shows that an embargo is no legitimate excuse for the non-performance of a contract. In the case of *Hore vs. Whitmore*, (3) it was determined that an embargo did not excuse the non-compliance with a warranty, in a policy of insurance, that a ship should sail on a day certain; and in *Beale vs. Thompson*, (4) though the plaintiff failed to recover his wages, it seemed to be agreed by all the judges that an embargo would not have barred him.

By the Court. We are all of opinion that the plaintiffs are entitled to recover their proportion of the hire during the whole voyage. The defendant might have employed the vessel in the coasting trade during the continuance of the embargo. But separately from this consideration, parties must be bound by their contracts, if they will not provide against contingencies, as they may, and as the defendant did in this case as to other contingencies.

(3) *Marshall*, 253. — *Cowp.* 784.(4) 3 *Bos. & Pul.* 405.

THE MAINE FIRE AND MARINE INSURANCE COMPANY versus LEMUEL WEEKS AND TRUSTEES.

Where one had delivered to his sureties certain negotiable promissory notes, for their indemnity against their liabilities on his account, and it was afterwards ascertained that the same were not necessary to their indemnity, no demand of them having been made by the bailor, it was held that the bailees were not chargeable as his trustees on account of their holding those notes.

To charge trustees, the principal must have a cause of action against them, or they must have in possession personal chattels belonging to him, capable of being seized and sold on execution. Negotiable notes are not such chattels.

THE persons summoned in this case, as the trustees of the defendant *Weeks*, having severally sundry demands against him, and having, as his sureties, executed bonds to the *United States*, for duties on merchandise imported by him, had received from him a conveyance of sundry effects to be by them appropriated for discharging their demands and indemnifying them against those bonds. Afterwards, those effects being apprehended to be insufficient for the purposes for which they had been conveyed, *Weeks* delivered

 THE MAINE FIRE AND MARINE INSURANCE COMPANY vs. WEEKS & TRUSTEES

to them two promissory notes payable to him and another, or order, and endorsed in blank by the promisees, which were [* 439] deposited with the supposed trustees, to hold * until it should be ascertained whether the other property, conveyed as aforesaid, would be sufficient to indemnify them, in which event they were to restore them to *Weeks*; but if the money due on those notes should be necessary to their indemnification, they were to collect it, and, after appropriating so much of it as should be so necessary, pay the surplus, if there should be any, to *Weeks*. From a statement exhibited by the trustees, it did not appear that the proceeds of those notes were necessary to their indemnity; and they had, since they were summoned in this action, delivered them over, by *Weeks's* order, to a third person, taking security from her to return them, or the money received upon them, in case they should be adjudged trustees of *Weeks* on account of their possession of the said notes at the time of their being summoned.

Upon the disclosure of these facts, the question before the Court was, whether the persons summoned as trustees were liable to be charged.

By the Court. These promissory notes were assigned to the supposed trustees as a further indemnity, if needed. It appears that they were not needed, and the defendant had a right to reclaim them. But, to charge the trustees, it is necessary that the principal have a cause of action against them, or the trustees must have personal chattels in possession, belonging to the principal, capable of being seized and sold upon execution. Negotiable notes are not such chattels. The defendant *Weeks* had no cause of action against these trustees on account of the notes, until a demand by him, and a refusal on their part to deliver them. If such demand and refusal had taken place, they would have been chargeable. As the facts are upon this disclosure, they must be discharged.

Mellen for the plaintiffs.

Whitman for the trustees.

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*JESSE CUMINGE *versus* SAMUEL RAWSON.

In trespass *quare clausum fregit*, commenced before a justice of the peace, and carried to the Common Pleas, upon the defendant's pleading title in himself, the plaintiff had leave to amend his declaration, by alleging any other torts in the same close, or by giving a more accurate description of the close.

THIS was an action of trespass *quare clausum fregit*, originally commenced before a justice of the peace for the county of *Oxford*. The trespass alleged was the breaking and entering the plaintiff's close in *Paris*, being part of his farm adjoining that of the defendant, and throwing down ten rods of the plaintiff's stone wall and five rods of his rail fence, and treading down his grass, &c.

The defendant appeared before the justice, and pleaded the title of himself to the close in justification, whereupon the justice, pursuant to the statute (1) in such case provided, ordered the defendant to recognize to the plaintiff to enter the action at the then next term of the Court of Common Pleas for said county. The defendant accordingly entered the action; and, after a continuance, the plaintiff, having obtained leave to amend his declaration, offered a new count, which contained a more particular description of the close in which the trespass was originally alleged to have been committed, but sets forth a supposed different trespass, *viz.* the erecting of twenty rods of stone wall thereon, but on the same day alleged in the first declaration. This amendment, being objected to by the defendant's counsel, was not admitted by the court.

The action being brought by appeal to this Court, the parties agreed, that if the Court here were of opinion that the said amendment was inadmissible, the plaintiff should become nonsuit; otherwise the action should stand for trial.

Hopkins, of counsel for the defendant, insisted that the amendment was properly rejected in the court below, because that court had jurisdiction of the action only in virtue of the recognizance entered into before the justice of the peace, upon the defendant's plea of soil and freehold in the close. The amendment proposed substitutes another action, not within the scope and effect of the recognizance. * Had the parties gone to trial on [* 441] the former declaration, the plaintiff never could have recovered. He ought not now to avoid the defence, by alleging an injury totally distinct from that, to which the defendant had been before called on to answer.

Dana for the plaintiff.

By the Court. This being the same close, the defence will not be varied by the amendment offered. The plaintiff may make any amendments in his declaration, by alleging any torts in the same close, or by giving a more accurate description of the close.

(1) 1783, c. 42.

STEPHEN MINOT *versus* JAMES CURTIS AND OTHERS.

A poll parish is within the statute of 1786, c. 10, § 5, which provides that the remaining part of a town, from which a parish is taken, shall constitute the first parish.

A parish may be known by several corporate names.

TRESPASS for taking and carrying away the plaintiff's horse.

The parties submitted the action to the decision of the Court upon an agreed case, from which it appears, that one *Smith Batchelder*, as a collector of taxes, by virtue of a tax-bill to him committed, in which the plaintiff was assessed the sum of one dollar and eighty-four cents, and of a warrant under the hands and seals of the defendants, styling themselves *assessors of the Congregational parish in Brunswick*, took the horse mentioned in the plaintiff's declaration, and sold the same at public auction, having previously advertised it according to law ; — That the town of *Brunswick* was incorporated in the year 1738 ; — That, by the statute of 1802, c. 85, sundry persons therein named, " with their families and estates, were incorporated into a religious society, by the name of *the Baptist Society in Brunswick*, with all the powers, privileges, and immunities to which other parishes are entitled by the constitution and laws of this commonwealth, for religious purposes only ; " — That the body styling itself the first parish in *Brunswick*, without having been incorporated, have, since the passing the act above mentioned, warned and held their meetings generally by the name of *the*

[* 442] *first parish in Brunswick* ; — sometimes * by the name of *the first Congregational parish or religious society in Brunswick* ; sometimes by the name of *the Congregational parish in Brunswick* ; and sometimes by the name of *the first religious society in Brunswick* ; by which last name they were called in the warrant for calling the meeting when the money was voted to be raised, which was assessed in the bills committed to said collector, wherein the plaintiff was assessed, and for the satisfaction whereof his horse was taken and sold as aforesaid ; — That there has never been a minister settled over the body calling itself the first religious society in *Brunswick* ; — That the plaintiff is not of the denomination of Baptists, nor has he complied with the forms required by the act aforesaid, to constitute him a member of the Baptist society in *Brunswick*, although he has, with his family, for more than six years, attended public worship with that society, and has never, during that time, attended any of the meetings of the first religious society, so called ; — That he has, during said six years, contributed annually

to the support of the settled minister of the Baptist society a larger sum than was assessed on him as above stated ; the said minister deriving his support solely from the voluntary contribution of his hearers ; — That the plaintiff was an inhabitant of *Brunswick*, when the said Baptist society was incorporated ; and so continued until the said tax was assessed, at which time he owned real and personal estate in said town ; — That the meeting, at which said tax was voted, and at which the defendants were chosen assessors, and said *Batchelder* collector, were duly notified and warned, unless the style used by them should be considered by the Court sufficient to invalidate the proceedings ; — That the said assessors and collector were duly chosen and sworn ; — That the said tax was duly assessed, and the sum assessed upon the plaintiff was his just proportion thereof ; if, on the facts agreed, he was liable to be taxed at all by the defendants ; — That he was duly notified of said tax, and the same was regularly demanded of him twelve days before his horse was taken as aforesaid, — * And that he refused to pay [* 443] the same ; and the said horse was sold for the purpose of satisfying said tax.

If, upon the facts agreed, the Court should be of opinion that the plaintiff had maintained his action, the defendants agreed that judgment should go against them by default for twenty-one dollars damage, with costs ; otherwise the plaintiff was to become nonsuit, and the defendants recover their costs.

Emery, for the plaintiff, contended that the society, under which the defendants assumed their authority as assessors, had so varied their corporate name from time to time, that they could not be said to have any fixed name at all ; and in the case here, the meeting at which the defendants were chosen, was of the *first religious society*, while the defendants in their tax-bill and warrant call themselves the assessors of the *congregation parish*. A corporation can be known in law only by its name, and one which is thus constantly shifting its name cannot be known at all.

Longfellow, for the defendants, argued that the statute of 1786, c. 10, § 5, in enacting that, in towns where one or more parishes shall be set off therefrom, the remaining part of the town shall constitute a distinct parish or precinct, and shall be considered as the principal or first parish, was not intended to give a precise corporate name to such remaining part. In the declaration of rights, prefixed to the constitution of the commonwealth, the words "parishes, precincts, and other bodies politic, or religious societies," are used as synonymous ; and the law is equally conformed to by using any one of those names, or sometimes one and sometimes the other. There was no danger of a mistake, since the other parishes would

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of course have their corporate names fixed and established by the acts incorporating them.

It has been suggested that a parish thus made of individuals living in different parts of a town, and which has obtained the
 * 444] name of a *poll parish*, is not within the statute * of 1786 ; but the expressions of the statute comprehend such a parish, as well as one described by a single territorial line ; and there is no reason of expedience to confine it to one description, to the exclusion of the other.

Emery, in reply. The statute has expressly fixed and established the corporate name by which the remaining part of a town shall be called and known, and it has no right or authority to assume any other name. "*It shall be considered as the first parish or precinct.*"

By the Court. We are all of opinion that the creating a poll parish is as much within the intention of the legislature in the statute referred to, as the erecting of a parish circumscribed by one continuous line, and in which all the lands shall join and be contiguous to each other. As to the fact of this parish having used several names in its public proceedings, we know not why corporations may not be known by several names, as well as individuals. If this point had been before the jury as a question of fact, the defendants would have been held to prove the identity of the parish thus acting under different names. But in the case at bar, that identity is agreed. The defendants are then entitled to judgment.

Plaintiff nonsuit.

 NATHANIEL NILES *versus* NATHANIEL SAWTELL.

In an action on a covenant of warranty of lands brought by one who has assigned his interest in the lands to another, the declaration must show that the plaintiff is answerable to his assignee.

THE plaintiff declares in a plea of *covenant* broken, upon a deed of the defendant, by which he, as collector of taxes for the plantation of *Bakerstown*, conveyed to one *John Glover*, in fee simple, certain lands in *Poland*, formerly part of *Bakerstown*, with a covenant of general warranty to *Glover*, his heirs and assigns, against the lawful claims and demands of all persons. The declaration then alleges a conveyance of the lands from *Glover* to the plaintiff in fee, and an eviction of one *Joseph Thurlo*, "assignee

of the plaintiff of the same lands, by the proprietors of *Bakerstown*, * by virtue of a lawful title and claim [* 445] thereto ; whereby the said plaintiff, as the assignee of the said lands, and his assigns, remain undefended against the lawful claims of all persons."

The defendant pleaded eight several pleas in bar, to several of which the plaintiff demurred, and the defendant joined in demurrer

The cause was coming on for argument at this term, when *Emery*, of counsel for the defendant, suggested that there was no allegation in the plaintiff's declaration that he was answerable to *Thurlo*, his assignee, on account of the eviction stated ; and that without such allegation he had shown no cause of action against the defendant. And of this opinion was *the Court*. The plaintiff thereupon obtained leave to amend his declaration, to which, when amended, the defendant had liberty to plead anew.

Whitman for the plaintiff.

THE INHABITANTS OF THE FIRST PARISH IN BRUNSWICK versus JOHN DUNNING, JUN., AND OTHERS.

A minister of a town, or parish, seised of lands in right of the town or parish, as parsonage lands, &c., is for that purpose a sole corporation, and holds the same to him and his successors.

In case of a vacancy in the office of minister, the town or parish is entitled to the custody of the lands, and may enter and take the profits until there be a successor.

Every town is considered to be a parish, until a separate parish be formed, when the inhabitants and territory not included in the separate parish form the first parish ; and the minister of such first parish by law holds, to him and his successors, all the estates and rights which he held as minister of the town before the separation.

THIS was an action of trespass for breaking and entering the close of the plaintiffs. The parties agreed to submit the cause to the determination of the Court upon certain facts stated. If thereon the Court should be of opinion that the plaintiffs were entitled by law to maintain the action, judgment was to be rendered in their favor for a sum agreed as damage, and for costs ; otherwise they were to become nonsuit, and the defendants to have judgment for their costs.

The facts agreed were, that the *Pejepscut* proprietors, so called,

being seised in fee of a large tract of land, including [* 446] * what is now the town of *Brunswick*, on the 23d day of June, 1715, voted and laid out, for the use of the ministry in said town, one hundred acres of land in said town, being the close described in the plaintiff's declaration, which is called the ministerial lot, and in which the alleged trespass was committed. *Robert Dunlap* was the first Congregational minister settled in the town, and during his ministry he occupied said lot. *John Miller*, the second Congregational minister, settled in the town, was ordained in the year 1761, and during his ministry occupied the said land, and erected the frame of a house thereon. In January, 1794, *Ebenezer Coffin* was settled as successor to Mr. *Miller*, and, during his ministry, which continued to the year 1800, he caused the said lot of land to be surveyed, and exclusively occupied the same. Since the dismissal of the said *Coffin*, no other minister has been settled as his successor.

On the 20th of June, 1794, a number of the inhabitants of *Brunswick* and *Harpwell*, in the county of *Cumberland*, and *Bath*, in the county of *Lincoln*, with their polls and estates, were incorporated, by the name of *The Baptist Religious Society in Brunswick, Harpwell, and Bath*, with all the privileges, powers, and immunities, which other parishes in this commonwealth are by law entitled to." (1)

On the 22d of February, 1803, certain persons named, with their families and estates, together with such others, being inhabitants of the town of *Brunswick*, as had or might, within two years after passing the act of incorporation, associate themselves for the same purpose, in the manner thereafter described, were incorporated into a religious society, by the name of *The Baptist Society in Brunswick*, with all the powers, privileges, and immunities, to which other parishes are entitled by the constitution and laws of this commonwealth. (2)

On the 4th of July, 1781, the said *Pejepscut* proprietors made a grant to said town of *Brunswick* of a lot of land in the said [* 447] town, by metes and bounds, supposed to contain * one thousand acres ; but further granted, "that in case there should be more than one thousand acres within the said bounds, the overplus, be it more or less, should be appropriated and granted for the support of the gospel in said town of *Brunswick* forever ; that is to say, for the use and improvement of the Rev. *John Miller*, the then present pastor of the church in said town of *Brunswick*, and his successors in said office forever.

(1) 1 *Mass. Special Laws*, 528.(2) 3 *Mass. Special Laws*, 111.

FIRST PARISH IN BRUNSWICK vs. DUNNING & AL.

On these facts *Alden*, of counsel for the defendants, contended that there had been no such division of the town of *Brunswick* into two parishes, as is contemplated in the statute of 1786, c. 10, § 4, 5, and that therefore the lands appropriated to the support of the ministry in the town still belonged to the town at large; so that the plaintiffs could not maintain this action.

Mellen, for the plaintiffs, cited the cases of *Weston vs. Hunt*, (3) and *Windham vs. Portland*. (4)

Curia. When a minister of a town or parish is seised of any lands in right of the town or parish, which is the case of all parsonage lands, or lands granted for the use of the ministry, or of the minister for the time being, the minister, for this purpose, is a sole corporation, and holds the same to himself and his successors. And in case of a vacancy in the office, the town or parish is entitled to the custody of the same, and for that purpose may enter and take the profits, until there be a successor. Every town is considered to be a parish, until a separate parish be formed within it; and then the inhabitants and territory, not included in the separate parish, form the first parish; and the minister of such first parish by law holds, to him and his successors, all the estates and rights which he held as minister of the town before the separation. Upon the facts agreed in this case, the plaintiffs are entitled to the custody and profits of the close, in which the supposed trespass was committed, and they are therefore entitled to judgment.

Defendants defaulted

(3) 2 *Mass. Rep.* 500.

(4) 4 *Mass. Rep.* 384.

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*WOODBURY STORER, Plaintiff in Error *versus* LEONARD WHITE.

Where, after a default, damages are assessed for the plaintiff, either by the jury or the judge, and the judge admits illegal evidence, the party aggrieved may file exceptions to such admission, and thus bring the question before the whole court.

Papers filed in a case, and used as evidence in ascertaining the plaintiff's damages after a default, are no part of the record, nor can the Court take notice of them upon a writ of error brought to reverse a judgment rendered for such damages

ERROR *coram vobis*, to reverse a judgment of this Court, rendered at the last May term of this Court in this county, in favor of the defendant in error, original plaintiff.

The declaration was in *assumpsit* upon a promissory note signed by the plaintiff in error, dated April 27th, 1807, for 3000 dollars, payable to *Ebenezer Storer*, or order, in one hundred and twenty days, at the Union Bank, in *Boston*, with usual grace, and endorsed by the said *Ebenezer* to the defendant in error. After sundry continuances in this Court, the defendant was defaulted, and the plaintiff's damages were assessed by the Court at 3365 dollars, for which sum, with costs, judgment was rendered.

The note filed in the case was of the following tenor : — "Portland, April 27th, 1807. For value received, I promised to pay Mr. *Ebenezer Storer*, or order, three thousand dollars, in one hundred and twenty days, at the Union Bank, in *Boston*, in *foreign money*, with usual grace. *Woodbury Storer*." And endorsed thus : — "For value received, pay the within to *Leonard White*. *Ebenezer Storer*."

The error assigned was the variance between the note filed in the case, and the note declared on ; the former being payable in foreign money, and therefore not negotiable ; and the note mentioned in the declaration being described as a negotiable note payable in cash.

Curia. It does not appear, from the record, what was the evidence before the judge, upon which the plaintiff had his damages assessed. But we must presume that the damages were assessed for the breach of the contract declared on.

If, after the default of the defendant, the plaintiff shall move to have jury to inquire into the damages at the bar,
[* 449] * pursuant to the provision of the statute 1784, c. 28, § 7 ; or if, without such motion, the judge shall assess the damages ; and in either case, the judge shall admit illegal evidence on the question of damages, the party aggrieved may file his exceptions to the admission, according to the proceedings in our courts ; and the judge ought to allow the exceptions, that the party may have the opinion of the whole Court thereon.

In the case before us, there appears to be no error on the record. For, although such a note as is described in the assignment of errors was filed in the case, yet we cannot take notice of it as a part of the record, any more than we could of a deposition, or other piece of evidence filed. The judgment must therefore be affirmed, with costs for the defendant in error.

Whitman for the plaintiff in error.

Kinsman for the defendant in error.

JOHN WARDER AND OTHERS *versus* DANIEL TUCKER.

An endorser of a bill of exchange is entitled to seasonable notice of a protest or non-acceptance, although he endorsed only for the accommodation of the drawer, and although the drawer had no effects in the hands of the drawee.

Where one, through a mistake of the law, acknowledges himself under an obligation, which the law will not impose upon him, he shall not be bound thereby.

CASE by the endorsees against the endorser of a bill of exchange.

The declaration alleges that *Lemuel Weeks & Son*, at *Portland*, on the 13th of August, 1807, drew their bill of exchange on the house of *Lodges & Tooth*, in *Liverpool*, for £945 sterling, payable to the defendant or his order at sixty days' sight; that the defendant endorsed the bill to the plaintiffs, who, on the 12th of October, presented the same for acceptance; that, the drawees refusing to accept the same, it was duly protested, of which the defendant had notice; that, on the 14th of December, the plaintiffs presented the bill for payment, which being refused, it was duly

* protested for non-payment, of which the defendant had [* 450] due notice, and thereby became liable, &c.

In the second count on the same bill of exchange, the plaintiffs allege an endorsement by themselves, and sundry posterior endorsements, and that the bill being presented for acceptance, and afterwards for payment, by the last endorsee, was duly protested for non-acceptance and for non-payment; that afterwards, on the 16th of December, one *John Copper*, at the city of *London*, paid the same for the honor of the plaintiffs, as second endorsers thereof; that the plaintiffs, on the 2d of March, 1808, received notice thereof, and paid the said *John Copper* the sum so paid by him, with interest; of all which the defendant, on the 11th of the same March, had notice, and thereby became liable, &c.

There is a third count for 6000 dollars, had and received by the defendant to the use of the plaintiff.

The cause came before the Court upon an agreed statement of facts, from which it appears that the bill of exchange declared on was drawn, endorsed, presented for acceptance and afterwards for payment, duly protested in each case, and taken up and paid by *Copper* for the honor of the plaintiffs, as alleged in the declaration; that the defendant endorsed the bill for the accommodation of *Weeks & Son*, and to give it a greater credit, he having no interest in it, and no compensation for his endorsement; that the drawers had no funds in the hands of the drawees; that the drawers, about the time of their failure, which was on the 25th of December 1807, made their promissory note to the defendant for 20,000 dollars, to enable him to secure sufficient property of theirs to indemnify him-

self against his liabilities on their account; upon which, however, he did not obtain enough to indemnify him against all his said liabilities, exclusive of his endorsement, for which this action is brought; that no notice was given by the plaintiffs to the defendant, or to the drawers of the bill, of the protest for the non-acceptance or the non-payment of the bill, until the 2d of March, 1808, when the plaintiffs at Philadelphia, where they dwell, wrote advice to both the said parties of the protest for non payment, which notice was received by the defendant on the 11th of March, the plaintiffs not having, until the said second day of March, received any notice of the non-acceptance, or of the non-payment, although a number of vessels sailed from Liverpool to various ports of the United States in the months of October, November, and December, 1807, by which letters were brought and received, some of which were dated the 13th of October, and others on the 3d and 5th of November, and were received in December; that the defendant wrote an answer to the plaintiffs' letter of the 2d of March, in which he expressed hopes of recovering property of the drawers sufficient to indemnify the plaintiffs, acknowledged his accountability to them for the amount of the said bill, and engaged to do all that was in his power to make payment.

It was agreed by the parties that if, upon the facts stated, the Court should be of opinion that the plaintiffs were entitled to recover, judgment should be entered for them for the amount of the bill, with customary charges, &c. ; otherwise they should become nonsuit, and the defendant recover his costs.

Longfellow, of counsel for the plaintiffs, considered that the principal, if not the only objection to their recovery, was the want of due notice to the defendant of the non-acceptance of the bill. But he contended that in a case circumstanced like this, where the endorser was a mere guarantor, having no interest in the bill, as he would have no right of action against the drawers, he had not the same claim to notice a *bonâ fide* endorser, who should have paid and received the value of the bill. In a negotiation of this sort, the drawers and the endorser stand on the same footing; and, as the drawers had no funds in the hands of the drawees, notice to them being unnecessary, so was it also to the defendant. (1)

If there were laches, it was not the plaintiffs that were guilty of them. But, at any rate, the defendant, by his letter to the plaintiffs, waived all advantage from want of due notice.

(1) 2 H. Black. 336, *De Bordt vs. Atkinson*. — 5 Mass. Rep. 167, *Colt & Al. vs. Noble*. — *Ibid.* 170, *Bond & Al. vs. Farnham*. — 3 Mass. Rep. 358, *Watson & Al. vs. Loring & Al.*

Hopkins, for the defendant, was stopped by the Court; and the action standing continued *nisi* for advisement, the opinion of the Court was delivered to the following effect, at an adjournment of the March term in *Suffolk*: —

Curia. Had this action been brought against the drawers of the bill of exchange declared on, as they had no effects in the hands of the drawees, a want of notice could not have availed them. But an endorser is entitled to seasonable notice of a protest for non-acceptance, whether the drawer has effects in the hands of the drawee or not, for the purpose of enabling him to secure himself against the drawer, if he should eventually be holden to pay the bill.

In this case, it appears that the bill was protested for non-payment on the 12th of October, 1807, and that the defendant had no notice thereof until the 11th of March, 1808. It appears, also, that the holder of the bill in *England*, immediately after the protest for non-acceptance, had several convenient opportunities to give seasonable notice, both to the plaintiffs and to the defendant, of the protest, which he neglected. By this neglect, the holder of the bill had lost his remedy as well against the plaintiffs as the defendant; and if the plaintiffs chose to waive this defence, the defendant shall not be prejudiced thereby. And, although the defendant, when he first received notice from the plaintiffs of the protest of the bill, considered himself as liable by law to pay the plaintiffs the amount of it; yet his ignorance of the law shall not bind him to fulfil an engagement made through mistake of the law. (a) It does not appear to us, from the facts, that the defendant ever received from the drawer funds to discharge this bill. We are, on the whole, therefore, of opinion that the facts stated do not maintain the plaintiffs' action.

Plaintiffs nonsuit.

(a) [In *England*, it seems to be settled otherwise. *Stevens vs. Lynch*, 12 *East*, 38. — 2 *Camp*. 322, *Cooper vs. Wall*. — *Chitty on Bills*, 536, n. f., 8th *Lond.* ed. — *Ed.*]

[* 453]

* JOHN WAITE, Plaintiff in Error, *versus* DANIEL GARLAND.

In an action commenced in the Common Pleas, the plaintiff recovered fifty cents damage, and taxed his costs at seventy-four dollars fourteen cents. — Upon error brought, the Court reduced the costs to twelve cents and a half.

THE writ of error, in this case, was brought to correct the errors of a judgment of this Court, rendered in an action commenced

November 2d, 1809, wherein *Garland* sued the plaintiff in error, then sheriff of this county, for the default of one of his deputies in the service of an execution sued by said *Garland* against one *Davis*, and he laid his damages at the sum of 3100 dollars. A verdict was returned for 50 cents damage. Judgment was entered thereon for that sum in damages, and for 74 dollars 14 cents costs.

Mellen, for the plaintiff in error, cited the statute of 1807, c. 122, § 2, which provides that where, in any action originally brought before the Court of Common Pleas, no more than twenty dollars debt or damage shall be recovered, the plaintiffs shall be entitled for his costs to no more than a quarter part of the debt or damage recovered.

The Court reversed the former judgment as to the taxation of costs, and ordered judgment to be entered for 50 cents damage and 12 1-2 cents costs.

PETER STUBBS *versus* JONATHAN LUND.

Where a merchant, in pursuance of a previous general agreement, had shipped goods to one on credit, who, after the shipment, became insolvent, the shipper had still a right to stop the goods *in transitu*; the credit contemplated being predicated on the supposed ability of the consignee to pay at the expiration of the credit.

The right of stopping *in transitu* goods shipped on the credit and risk of the consignee remains until they come into his actual possession at the end of the voyage; unless he shall before have sold them, and assigned the bills of lading to the purchaser.

And in all cases, where an actual possession of the consignee, after the end of the voyage, is provided for in the bills of lading, the right of stopping *in transitu* remains after the shipment, whether the consignee be the hirer or owner of the ship, or the shipment be made on a general ship. — But if the goods are shipped for a foreign market, and are not to be transported to the consignee the right of stoppage ceases on the shipment.

REPLEVIN of a quantity of salt and coals. The defendant pleads in bar that the said salt and coals were the proper goods and chattels of *Lemuel Weeks* and *William C. Weeks*, traverses the property of the plaintiff, and prays a return to be adjudged him, with his damages and costs. The plaintiff tenders an issue on the traverse, which is joined by the defendant.

[* 454] * This issue was tried before *Thatcher, J.*, at an adjournment of the last May term in this county, and a verdict found for the plaintiff, agreeably to the directions of the judge,

to which directions the defendant filed his exceptions, which were allowed by the judge.

From the exceptions, it appears that the house of *Logan, Lenox, & Co.*, at *Liverpool*, in *England*, of which the plaintiff was one, had shipped the cargo of salt and coals on board the ship *Henry*, *Joseph Weeks* master, on the credit, and on the account and risk of the said *L. & W. C. Weeks*, and consigned the same to them or their assigns, for which the master had signed bills of lading; but before the ship had left the port of *Liverpool*, the shippers being informed of the insolvency of the consignees, refused to let the ship sail under the said shipment of the cargo. Afterwards, on the master's signing other bills of lading, acknowledging the cargo to be shipped by the same persons, consigned to the plaintiff, the master was permitted to sail.

There was shown in evidence to the jury an agreement between *Logan, Lenox, & Co.*, and *L. & W. C. Weeks*, by which the former contracted to accept the drafts of the latter, or to advance them cargoes on credit, to a limited amount; also a copy of an account current, in which the cargo in question was charged by the former to the latter. The defendant is a deputy sheriff of this county, and had attached the goods in question as the property of the said *L. & W. C. Weeks*, at the suit of *Daniel Tucker*, in an action brought upon several promissory notes.

The motion of the defendant for a new trial, grounded on the supposed misdirection of the judge, was argued by *Whitman* and *Hopkins* for the defendant, and *Mellen* and *Emery* for the plaintiff.

For the defendant, it was contended that he had a right to a return of the goods replevied, unless the plaintiff was the rightful owner of them at the time of the attachment. The house of *Logan, Lenox, & Co.* were the original owners. They shipped it, under the agreement on file, on board a * ship sent to [* 455] them by *L. & W. C. Weeks*, as their entire chartered ship for the purpose of conveying a cargo to *Logan, &c.*, and receiving the cargo in question in return for *L. & W. C. Weeks*. The first question, material to be considered, is, whether the property of the goods, under the circumstances of the case, passed to the consignees. If it had passed absolutely to them, there remained to the consignors no right of stoppage *in transitu*. But the delivery to the master of the ship, owned wholly by the consignees, was a delivery to them to all intents and purposes, he being their servant and agent duly authorized to receive such delivery. The property thus vested in them, and the power and rights of the consignor, wholly ceased. This is a very different case from lading goods on board a general ship, the master of which is in no sense the representative of the

consignees of any goods shipped on freight. In such case, it is acknowledged that the right of the consignors to stop *in transitu* continues until the goods come into the actual possession of the consignees. (1)

But if this distinction, which is clearly taken in the books, should be thought unfounded, still it is contended that the special agreement in this case, and the delivery of the cargo pursuant to that agreement, took from the shippers in *Liverpool* any right they might otherwise have possessed of stopping the goods.

If, in fine, they really had the right now set up, yet they in fact never exercised it. For in the account current exhibited by them long after this transaction, they charge *L. & W. C. Weeks* with this identical cargo, and with interest on the cost of it up to the date of the account.

For the plaintiff, it was insisted that the contract by the first bill of lading was dissolved and rescinded by the parties to it. Of their right to do this there can be no question. But if this ground is objected to, then it is contended that the goods were lawfully stopped *in transitu*.

The right of stopping *in transitu* remains generally in the consignor until an actual delivery to the consignee. [* 456] * There are certain exceptions, and limitations, by which this right is in certain instances taken away; as where the bill of lading has been assigned for a valuable consideration, without notice to the assignee that the goods are not paid for; such assignee will hold the goods, and the right of the consignor to stop them *in transitu*, as against him, is gone. (2) So, when a part of the goods has been delivered to the consignee, the right to stop *in transitu* is gone as to the remainder. (3) So, also, when the goods have been delivered to the *special agent* of the purchaser or consignee, the right is taken away. (4) But not when delivered to an intermediate man, as a wharfinger, packer, or *master of a ship*. (5) The right of stoppage *in transitu* is also taken away when goods are put on board a vessel to be transported to a port, other than that wherein the consignee resides. (6) The case here was not within any of the

(1) *Abbott on Shipping*, Part 3, c. 9, § 4. — *Fowler & Al. vs. M'Taggart & Al.*, 7 D. & E. 442. 1 East, 522. — *Ingdis vs. Usherwood*, 1 East, 515.

(2) 2 D. & E. 63, *Lickbarrow vs. Mason*.

(3) 2 H. Black. 504, *Stubey vs. Hayward*. — 1 New Rep. 69.

(4) 4 Esp. Rep. 243, *Leeds vs. Wright*. — 3 Bos. & Pul. 320, S. C. — 3 Bos. & Pul. 469, *Scott vs. Pettit*. — 5 East's Rep. 175, *Dixon & Al. vs. Baldwin & Al.*

(5) 3 East, 381, *Bothlingk vs. Inglis*. — 3 D. & E. 467, *Ellis vs. Hunt*. — 2 Bos. & Pul. 457, *Mills vs. Ball*. — *Abbott*, 426, *Nix vs. Olive*.

(6) 3 East, *ubi supra*, and *Fowler vs. M'Taggart*, *there cited*. — 3 Esp. Rep. 58, *Bothlingk vs. Schneider*.

exceptions or limitations recognized by the law. The right of stoppage *in transitu* remained then in the house of *Logan, Lenox, & Co.*; and the bills of lading vested the right in the plaintiff, which he would enforce by his writ of replevin.

The action was continued *nisi*, and the opinion of the Court was delivered in *Boston*, at an adjournment of the last March term, by

PARSONS, C. J. The title of the plaintiff is admitted to be good, if the consignors had, under the circumstances of this case, a right to stop the goods in question, *in transitu*.

To this right the defendant has made two objections.

1. That the general credit given to the original consignees by the consignors, which is stated at large in the exceptions, had excluded the consignors from the right of stopping *in transitu* goods shipped and consigned pursuant to that agreement. But in our opinion, this objection cannot prevail. That agreement cannot bind the consignors after the insolvency of the consignees; the credit contemplated being predicated upon the supposed ability of the consignees to pay at the expiration of the credit. And a *credit, [*457] given under such an agreement, can have no other effect on this question, than the credit given under the first bills of lading

2. The other objection is, that the consignees being either the owners or the hirers of the ship *Henry*, as soon as the goods were received on board that ship, and bills of lading signed by the master, there was no further transit, the goods being in the possession and custody of the consignees. And to support this objection, it was urged by the defendant's counsel, that the right to stop *in transitu* extends only to goods shipped on board a general ship.

We think this objection cannot prevail. The right of stopping all goods shipped on the credit and risk of the consignee remains until they come into his actual possession at the termination of the voyage, unless he shall have previously sold them *bonâ fide*, and endorsed over the bills of lading to the purchaser. And in our opinion, the true distinction is, whether any actual possession of the consignee or his assigns, after the termination of the voyage, be or be not provided for in the bills of lading. When such actual possession, after the termination of the voyage, is so provided for, then the right of stopping *in transitu* remains after the shipment. Thus, if goods are consigned on credit, and delivered on board a ship chartered by the consignee, to be imported by him, the right of stopping *in transitu* continues after the shipment, (3 *East*. 381;) but if the goods are not to be imported by the consignee, but to be transported from the place of shipment to a foreign market, the right of stopping *in transitu* ceases on the shipment, the transit

being then completed; because no other actual possession of the goods by the consignee is provided for in the bills of lading, which express the terms of the shipment. (7 D. & E. 442.) (a)

The same rule must govern, if the consignee be the ship owner. (b) If the goods are delivered on board his ship, to be carried to him, an actual possession by him, after the delivery, is provided for by the terms of the shipment; but if [* 458] * the goods are put on board his ship to be transported to a foreign market, he has on the shipment all the possession contemplated in the bills of lading. In the former case the transit continues until the termination of the voyage; but in the latter case the transit ends on the shipment.

We think, also, that the same distinction must exist in the case of a general ship. If a ship sail from this country to *Great Britain*, with the intention of taking on board goods for divers persons on freight, to be transported to a foreign market, as the mercantile adventures of different shippers; if goods are so shipped by the several consignors, there is no transit to the consignees after the shipment; and no right of stopping remains with the consignors. But it is otherwise when several persons import goods in a general ship on their own credit and risk, for a future actual possession by them is provided for in the bills of lading.

Upon the best view we have been able to give the case before us, we are satisfied that the verdict is right, and that judgment must be entered upon it.

(a) [*Rowley vs. Bigelow*, 12 Pick. 307. — Ed.]

(b) [Sed quære. Vide *Abbott on Shipping*, 5th edition, 374. — Ed.]

WILLIAM STANWOOD *versus* NEHEMIAH PEIRCE.

Where a turnpike road was authorized by the legislature to be located and made from *Bowdoin College* to a certain place in *Bath*, and the Sessions laid out the road seventeen rods distant from the college buildings, and eight rods from the land appropriated to the use of the college, the road was held to be well laid out within the intent of the legislature.

THIS was an action of *trespass*, for breaking and entering the plaintiff's close, situate in *Brunswick*, in this county, and cutting down his trees, subverting his soil, &c.

The action was submitted without argument to the opinion of the

Court, as to a part of the trespass charged, upon a case stated. The facts in the case will be found recited by the Court in their opinion, as the same was delivered at this term by

PARSONS, C. J. That part of the trespass which, by the facts agreed, is submitted to our decision, the defendant justifies as agent of "*The Bath Bridge and Turnpike Corporation*," in making a turnpike road, located by the Court of Sessions; and if this road is to be considered, in this action, as legally located, the justification is sufficient and legal.

* This corporation was created by the statute of 1804, [* 459] c. 110, for the purpose, among others, "of laying out and making a turnpike road from *Bowdoin College*, in *Brunswick*, to the new meeting-house in *Bath*, upon as straight a line as circumstances will admit." And the Court of Sessions, for the county of *Lincoln*, are authorized, with the consent of the said proprietors, to locate the said road. The road was located by the Sessions; a part of it being laid over the plaintiff's close; and he objects to the location, on the ground that it is not conformed, as to the *termini* of the road, to the directions of the act referred to.

It is agreed, or has been admitted, that the trustees of *Bowdoin College* were seised of a parcel of land, which adjoined on the plaintiff's close, and also on the great or twelve rod public highway in *Brunswick*; that on the said parcel of land, so owned by the said trustees, a chapel and hall, and also a house for the president of the college, had been erected before the passing of the statute; and that since the passing of the statute another hall had been built, for the use of the students; that the turnpike commences on this twelve rod way, passing over the plaintiff's close, about seventeen rods to the northward of the hall first erected, which hall is eight rods distant from the southerly side of the plaintiff's close; that, had the road run directly from the said "new meeting-house in *Bath*" to the college hall already mentioned, it would not have interfered with the plaintiff's close; and that the road might have been located, on the north side of the hall aforesaid to the said twelve rod way, on land belonging to the trustees of the college.

On this statement we are to decide, whether the Sessions have, or have not, erred in executing the statute.

If by "*Bowdoin College*" is intended in the statute the hall first built, on which the plaintiff insists, we should incline to support this action; as the road runs at the distance of seventeen rods from it, without any apparent necessity or public convenience.

But if the legislature intended *by *Bowdoin College* not [* 460] any particular building, but the land holden by the trustees, on which to erect suitable buildings to accommodate the

students, their instructors, and governors, then a different construction ought to be given to the powers vested in the Sessions.

And that such was the intent of the legislature we are satisfied ; as the word *college* is more naturally applied to the place where a collection of students is contemplated, than to the hall or other buildings intended for their accommodation. We cannot therefore presume that the legislature designed that part of the college land should be covered with the turnpike, or that the turnpike should not terminate in the great *Brunswick* road. It is our opinion that, by a reasonable construction of the statute, the turnpike was to be laid out from the great road, near *Bowdoin College*, to *Bath* new meeting-house, running as nearly on a straight course as circumstances would admit ; and by the actual location the turnpike extends from that meeting-house to *Brunswick* great road, passing not more than eight rods from the lands holden and appropriated for *Bowdoin College*.

This distance does not appear to be unreasonable, and it is within the discretion vested by the statute in the Sessions. On this ground, it is our opinion that the defendant's justification must prevail.

If, however, the Court of Sessions had manifestly exceeded its power, as it was acting, not within its general jurisdiction, but under a special power granted for a particular purpose, we are inclined to believe that the location, under such circumstances, would be void. But it is not necessary to decide this question, as on the first ground we think the defendant's justification good.

As to the trespass charged on that part of the plaintiff's close not covered by the turnpike, a rule of reference must be entered, pursuant to the agreement of the parties.

Alden for the plaintiff.

Mellen and Coffin for the defendant.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF KENNEBECK, JUNE TERM, 1811.

AT AUGUSTA.

PRESENT:

HON. THEOPHILUS PARSONS,	CHIEF JUSTICE.
HON. SAMUEL SEWALL,	} JUSTICES
HON. GEORGE THATCHER,	
HON. ISAAC PARKER,	

**LEMUEL HAWKES AND ANOTHER *versus* THE INHABITANTS
OF THE COUNTY OF KENNEBECK.**

An action against the inhabitants of a county cannot be sued in the Common
Pleas for such county.

ASSUMPSIT for work and labor performed by the plaintiffs, (who are inhabitants of *Vassalborough*, in the county of *Kennebeck*,) about the new jail lately erected in this county. The writ was sued out of the Common Pleas for this county, and bore test of the first justice thereof.

The defendant suggested that *Joseph North*, Esq., the first justice of the Common Pleas, and in whose name the writ was tested, was an inhabitant of the county of *Kennebeck*, and a party to the action, and for this cause moved the Court to abate the writ.

At the last May term in this county, *Perley*, for the defendants, cited the fifth article of the sixth chapter of the constitution of this

HAWKES & AL. vs. INHABITANTS OF KENNEBECK.

commonwealth, which prescribes that "all writs issuing out of the clerk's office of any of the courts of law shall be in the name of the commonwealth of *Massachusetts*; they shall be [* 462] under the seal of the * court from whence they issue; they shall bear test of the first justice of the court to which they shall be returnable, *who is not a party*, and be signed by the clerk of such court."

Wilde, for the plaintiffs. The defendants, if they would except to our writ, are bound to furnish us with a better. But in this case they have not done it, nor could they; for, unless this action is maintainable, no action can be brought, and the plaintiffs are without remedy; since, by the statute of 1784, c. 28, § 13, it is enacted "that when the plaintiff and defendant both live within the commonwealth, all personal or transitory actions shall be brought in the county where one of the parties lives. And when an action shall be commenced in any other county than as above directed, the writ shall abate, and the defendant be allowed double costs."

But the first justice is not "a party," in the sense of the constitution; and if he is, so are the rest of the justices; there is, then, no person to test the writ, and there will be a failure of justice.

The interest of the justices in the event of the suit is so very minute, as to be below consideration; and if it were greater, as it is wholly against the plaintiffs, and they, by bringing the action, have waived all objections on that ground, it is not for the defendants to avail themselves of it, in avoidance of a just and legal demand.

The action stood continued to this term for advisement; and now the opinion of the Court was delivered by

PARSONS, C. J. The action is *assumpsit*, on a writ sued out of, and returnable to, the Common Pleas for this county, which is tested by *Joseph North*, first justice of the said court. The defendants move that the writ may abate for matter apparent on the face of it; that by law every writ is to bear test of the first justice of the court of which it may be sued, who is not a party; and that every inhabitant of the county of *Kennebeck* is a party.

[* 463] * As by law the several justices of the Courts of Common Pleas must be inhabitants and freeholders of the county for which the courts are respectively holden; and as in judgments recovered against the inhabitants of a county, the estate of every inhabitant is liable to be taken by execution to satisfy such judgments; every inhabitant of a county may be deemed a party to all actions sued against it. And if this motion prevails, the consequence is, that no action against a county can, as the law now is, be sued in the Court of Common Pleas for such county.

This consequence is admitted by the defendants, who, not rely-

ing merely on the statutes of the government, have recurred to the constitution of the commonwealth, which is a paramount law; in which it is also declared that all writs shall bear test of the first justice, not a party.

In looking into our statutes, there are two which relate to suits against a county. The statute of 1782, c. 11, authorizing a sheriff to sue for an indemnity by the county for the insufficiency of the jail, impowers him to commence the action, either in his own or an adjoining county, at his election. But the more general statute of 1809, c. 127,[†] provides that when a private individual shall sue a county, the suit may be commenced in that county, or in an adjoining county, at his option; but that all actions sued by a county shall be sued in an adjoining county.

This option may be supposed to be given on the ground that if a plaintiff, having a demand against a county, was willing to submit to the judges or jury of the county, there could be no objection; for *volenti non fit injuria*. And as the teste of the writ is mere form, if this Court had a power, which it has not, of ordering an action commenced in one county to be tried in another, when impartial justice required it, we should be strongly inclined to support this option, as constitutionally given.

But when it is considered that every action must, in this state, be tried in the county in which it is commenced, it * seems most reasonable to adhere to the express words [* 464] of the constitution; so that, in all cases where a county is a party, the Court can compel an impartial trial. For if the plaintiff, in exercising this right of option, should sue in the county, the inhabitants of which are defendants, every judge and every juror, as interested directly in the event of the suit, might legally refuse to sit as a judge, or to act as a juror, and there would be a failure of justice. But by not granting this option, and directing that all actions, in which the inhabitants of a county are a party, shall be sued in some disinterested county, an impartial trial may always be had, and the express letter of the constitution be adhered to; from which we ought never to depart, unless to pursue the general manifest intention of the people, who were the legislators in establishing it as the supreme law of the land.

It is therefore our opinion that the motion must prevail, and the writ be quashed, because it was sued in the wrong county.

Writ abated.

[†] This statute was made after the commencement of the present action.

EDWARD ESTY, JUN., AND OTHERS, *versus* JOHN CHANDLER, Esq., Sheriff, &c.

A sheriff is answerable to a judgment creditor for the thirty per cent. interest given by the statute of 1783, c. 44, § 3, when his deputy refuses to pay over moneys received on execution, as well as when the sheriff himself refuses.

THIS was an action of the case against the defendant, sheriff of the county of *Kennebeck*, in which the plaintiffs allege that, having recovered a judgment against one *Russell Freeman*, and sued out their execution thereon, they delivered the same to one *Samuel Lovejoy*, a deputy of the defendant; and that the said deputy, on the first day of September, 1808, received of the judgment debtor the amount due by the execution, which the plaintiffs, on the first day of November following, demanded of the deputy. The plaintiffs then allege that the defendant has become liable to pay to them the same sum, with thirty per cent. interest, from the time of the said demand.

[*465] *The parties agreed to a statement of facts, in which the delivery of the execution to the deputy sheriff, the levying the money by him, and the demand upon him, are admitted, as alleged in the declaration; and it is further agreed that the plaintiffs, on the fifteenth day of November, 1809, also demanded the money of the defendant.

The questions referred to the Court upon these facts were, whether the defendant was liable to pay thirty per cent. interest for any time; and if so liable, whether from the time of the demand made on *Lovejoy*, his deputy, or from the time of the demand on himself only.

At the last May term, *Boutelle*, of counsel for the plaintiffs, cited the statute of 1783, c. 44, § 3, by which it is provided that "if any sheriff or his deputy shall unreasonably neglect or refuse to pay any person any money received by him upon execution to the use of such person, upon demand thereof being made, he shall forfeit and pay to such person five times the lawful interest of such money, so long as he shall so unreasonably detain the same after such demand is made."

The sheriff is answerable *civiliter* for all the defaults of his deputies, in the duties enjoined on them by law. (1) And although he might not be liable for a fine imposed on the deputy for official misconduct, yet this extra interest is not inflicted as a penalty, but

(1) 4 Mass. Rep. 63, *Marshall vs. Hosmer*.

may more properly be considered in the nature of cumulative damages to the creditor, for which the deputy must indemnify the sheriff; (2) and a demand upon the deputy is therefore equivalent to a demand on the sheriff, who always has or may have sufficient security for the faithful conduct of his deputies.

Warren, for the defendant, argued that this, being a penal statute, was not to be extended by construction. The deputy is an officer as well known to our laws as the sheriff, and in the passage of the statute, on which this action is predicated, is mentioned as a distinct person from the sheriff, and is thereby made personally liable to this severe *penalty. In *England* he is not [*466] considered as a distinct officer. *English* authorities, therefore, do not apply. The statute says the officer must "unreasonably neglect," &c.; but the conduct or the neglect of the deputy can never be imputed as unreasonable to his principal, for he knows nothing of it.

The inconvenience of holding the sheriff liable to this penalty may be extreme. The creditor, assured of such extravagant advantage, will be induced to conceal the fact from the sheriff, so long at least as the estate of the latter shall be esteemed sufficient to respond the damages; and thus the most faithful and upright officer in the government may be utterly ruined, without any personal imputation upon him, even for the slightest neglect of his duty.

The action stood over for advisement to this term, when the opinion of the Court was delivered by

PARSONS, C. J. In this case it is admitted by the sheriff, that he is answerable for the default of his deputy, to the amount of the money collected, and six per cent. interest thereon, from the time of the refusal to pay the same over, as the legal measure of damages; but he denies that he is answerable for *fourfold* interest, that being a penalty imposed on the deputy for his personal default.

The statute provides, that if a sheriff or his deputy shall refuse to pay over the money collected on an execution, he shall be liable, not only to pay the money, but also fivefold interest. A deputy, in refusing to pay over the money, is guilty of a breach of official duty, for which the sheriff is answerable; and the measure of damages, incurred by this breach, must, in our opinion, be the same, whether the action be brought against the sheriff or his deputy. And if the fivefold interest be recovered against the sheriff, he has

(2) 2 D. & E. 148, *Woodgate vs. Knatchbull*. — 2 Esp. Rep. 507, *Jons vs. Perchard & A.*, *Sheriffs of London*.

ESTY & AL. vs. CHANDLER.

nis remedy over on the bond of indemnity given him by his deputy. If he has omitted to take such bond, it is his own negligence, for which he must answer; and the creditor ought not to suffer, who has no agency in the appointment of the sheriff's deputies.

[* 467] * Let judgment be entered for the plaintiffs, for the money collected, with thirty per cent. interest, from the time of the refusal by the deputy to pay the same.

DANIEL MOORE *versus* JOHN HEALD.

The provision of the statute of 1807, c. 122, § 2, limiting costs to one quarter of the damages recovered in actions commenced in the Common Pleas, where those damages are less than twenty dollars, does not extend to judgments rendered on the report of referees.

At the last term *this action* was submitted to the determination of referees, under a rule of this Court. The referees made their report at the present term, in substance that the plaintiff recover ten dollars damage, with costs of Court.

The report being accepted, the plaintiff moved that full costs be taxed for him, notwithstanding the provisions of the statute of 1807, c. 122, § 2, which enacts that "if, upon any action originally brought before the Court of Common Pleas, judgment shall be recovered for no more than twenty dollars debt or damage, in all such cases the plaintiff shall be entitled for his costs to no more than one quarter part of the debt or damage so recovered."

The Court took time to consider the motion, and the next week, at *Wiscasset*, gave their opinion that a judgment rendered upon the report of referees is not within the statute, and that the plaintiff, in this action, was entitled to his full costs; and judgment was entered accordingly.

THE INHABITANTS OF GREENE *versus* THE INHABITANTS OF MONMOUTH.

Where, in an action against the town of *A*, for expenses incurred by the town of *B*, in the support of a pauper, it appeared that the pauper's settlement was not in *A*, but that the defendants were estopped from denying the settlement, and a verdict was given against them; the Court refused to set aside the verdict, for the purpose of permitting the defendants to pay the money found due by the verdict, and thus prevent a judgment, which would bar them upon the question of settlement, as to any after expenses.

THIS was an action of *assumpsit*, commenced November 1, 1808, to recover the sum of 158 dollars 32 cents, for the support of a pauper, from November 1, 1806, to November 1, 1808, at 1 dollar 33 cents per week, and for 24 dollars for clothing, furnished the pauper during the said term; the plaintiffs alleging the pauper's legal settlement to be in *Monmouth*.

* This action was tried at an adjournment of the last [* 468] October term, in this county, before *Thatcher, J.*, whose report states, that it was in evidence at the trial, that on the 15th of December, 1806, the overseers of the poor of the town of *Greene* gave notice to the overseers of the poor of *Monmouth*, in due form of law, and requested a removal of the pauper to *Monmouth*. Such removal was not effected, nor any answer given to said notice, or objection made thereto, within two months. The father of the pauper was duly settled in *Greene* before the birth of the pauper, which was on the 10th of January, 1782. After the pauper had attained the age of 21 years, and before the expenses now demanded were incurred, the father removed with his family, of which the pauper was one, into *Monmouth*, and there gained a settlement. In January, 1807, the father again removed with his family to *Collegetown* plantation, and there lived until and after the 28th of February, 1807, on which day the said plantation was incorporated into a town by the name of *Dixmont*. It was further proved that said pauper, ever since he was three years old, has been a cripple, and wholly incapable of doing any work, or of gaining his support; but that his mind was not impaired.

It was also in evidence, that the overseers of *Greene*, about six years ago, and before the father had gained a settlement in *Monmouth*, at the request of the overseers of *Monmouth*, removed the pauper to *Greene*, and have ever since maintained him.

The defendants had leave of Court, although opposed by the plaintiffs, to bring into Court, on the common rule, and lodge with the clerk for the use of the plaintiffs, the sum of 24 dollars, being

the amount of the expenses incurred in the support of the pauper up to the time of the notice given as aforesaid, and for two months next following; and also another sum of 129 dollars, being the plaintiff's costs of suit to that time.

[* 469] * A verdict was found for the plaintiffs for the sum demanded by them, subject to the opinion of the Court on the foregoing facts; it being agreed, that if the Court should be of opinion that the plaintiffs are by law entitled to maintain this action, or that the defendants are barred from contesting the pauper's settlement by reason of the notice aforesaid, and the omission to answer or object to the same, the verdict should stand, and judgment be entered thereon, deducting the 24 dollars paid into Court by the defendants. But if the Court should be of opinion that the plaintiffs are not by law entitled to maintain their action, the verdict should be set aside, and a nonsuit entered. In either case the plaintiffs were to receive the sums paid into Court by the defendants.

Mellen, of counsel for the defendants, was very clear that the pauper had no legal settlement in *Monmouth*. When his father acquired his settlement there, this son was of full age, and so could gain no derivative settlement from his father. The plaintiffs rely on the estoppel furnished by the statute upon the lapse of two months from the notice without removal or objections. But in the case of *Leicester vs. Rehoboth*, (1) where the money had been paid, the defendants were not estopped to deny the settlement in an action for posterior expenses. The defendants, having here paid the money before verdict, with all costs, are equitably entitled to the benefit of that decision.

Upon a suggestion from the Court, that if the position taken by *Mellen* were correct, yet the defendants were not within it; for the verdict was still against them, notwithstanding the money brought into Court by them: *Mellen* then moved that the verdict might be set aside, in order that the defendants might have opportunity to bring in the whole sum.

Per Curiam. We cannot grant the motion. We must govern ourselves by principles settled. The plaintiffs have a right to the benefit of the estoppel in this last stage of the cause.

[* 470] Perhaps, if the defendants had, during the trial, *brought into Court the whole sum due from them, with the costs, and thus complete justice had been done, we might then have thought them, on equitable considerations, within the principle of the decision in the case of *Leicester vs. Rehoboth*, and might have

(1) 4 Mass. Rep. 180.

GREENE vs. MONMOUTH.

ordered a stay of proceedings; or, if the plaintiffs had objected to that course, the cause might have been again sent to the jury, who would have found a verdict for the defendants; so that no judgment would have been entered to bar them upon the question of settlement, as to any further expenses. But we cannot now set aside the verdict, for the purpose of giving them an opportunity of paying into Court what that verdict has proved to be due from them, without consent, the plaintiffs being entitled to the benefit of the agreement made in the case.

Let the verdict be amended by deducting the 24 dollars paid, and let judgment be then entered upon it.

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NATHANIEL PARKER *versus* CALEB HANSON, JR.

The payee of a promissory note, who had endorsed it with a saving of his own liability, was received as a competent witness to prove an alteration of the note after its execution.

ASSUMPSIT on a promissory note of the following tenor, viz. "*Vass. 23, 3 mo. 1803. Value received, I promise to pay Bartholomew Taber, or order, seventy-five dollars, in three years from date, interest. Caleb Hanson, Jun.—Attest. Elihu Hanson.*"

On the back of the note were the two following endorsements, viz. "*I am not to be holden; for value received, pay the contents to Nathaniel Parker.*" Bart. Taber."

"*The endorser is holden, but the signer is to be called on first, and myself next.*" Elihu Hanson."

At the trial upon the general issue, at an adjournment of the last October term, before *Thatcher, J.*, the signature of the note by the defendant, and the regular endorsement of it by *Taber*, were admitted; but it was suggested, on the part of the defendant, that the note had been altered since *it was executed, [* 471] and it was insisted that by such alteration it had become void. To prove the alteration, the defendant called *Taber* as a witness, who was admitted by the Court, though objected to as incompetent by the plaintiff; and he testified that the note had been altered, since it was made, by changing the figure 5, in the date of the year, into the figure 3, thus making 1805 into 1803. He testified, also, that it was in the hands of *Elihu Hanson* for some time before it was endorsed by him, *Taber*, and he did not know

whether, at the time of his endorsing it, he noticed the alteration, nor whether it was made before or after his endorsement; but he was certain that the alteration was not made before the note was put into the hands of *Elihu Hanson*, as before stated. He further testified that the note was actually made and signed in March, 1805, and was in his hand-writing.

A verdict was returned for the defendant by consent, subject to the opinion of the Court, whether *Taber* was a competent witness to prove the facts to which he testified.

Mellen for the plaintiff.

Wilde for the defendant.

By the Court. The question submitted is, whether *Taber* was a legal and competent witness. He was not interested in the event of the suit, since, by his special endorsement of the note, he had protected himself from all liability upon it. But it is suggested, that he ought not to have been admitted within the rule which forbids a party to a negotiable security to impeach it as originally void. (a) The rule does not apply to the facts of this case. The note is not objected to as originally void, but as having been fraudulently altered; and this the witness was competent to prove.

Judgment on the verdict.

(a) [No such rule exists in the common law. — Ed.]

[* 472]

*JOHN HART, Plaintiff in Review, versus JOHN JOHNSON.

The limitation and settlement act (*stat.* 1807, c. 74) does not extend to actions tried on review.

THIS was a review of a real action, commenced by *Johnson* against *Hart*, and tried upon the appeal September term, 1806, when *Johnson* recovered judgment against *Hart* for his seisin of the demanded premises and costs of suit. On that judgment a *pluries* writ of possession was duly issued October 10th, 1808, and on the 14th of the same month, seisin was duly delivered by the sheriff. In the trial of the original action, there was no request to have the jury estimate, and by their verdict ascertain, the increased value of the demanded premises, by virtue of the buildings and improvements made thereon.

The writ of review was sued out on the 26th of September,

HART vs. JOHNSON.

1808; and at the trial thereof, which was had at the last October term in this county, before *Thatcher, J.*, the plaintiff in review, after the jury were impanelled, and after the defendant in review had read his title-deeds to the jury, moved the Court to be permitted to file his claim for the jury to inquire into and ascertain the increased value, &c., according to the statute in such case provided. The judge who sat in the trial granted the motion, and permitted the plaintiff in review to give evidence accordingly; and thereupon the jury returned their verdict, and estimated the increased value of the premises demanded at 285 dollars 71 cents. The defendant in review excepted to the said admission and direction, and the cause stood continued to this term for decision.

Williams supported the exceptions, contending that this was in nature of a new plea, and therefore could not be received upon a review; the statute (1786, c. 66, § 1,) expressly declaring that there shall be no further pleadings; but the action shall be tried upon the review by the issue appearing upon the record to have been originally joined by the parties. Another ground of objection in this case is, that the defendant in review had recovered his judgment * for seisin and possession long before [* 473] the limitation and settlement act passed, which was on the second of March, 1808. It is conceived, too, that the motion of the plaintiff in review should have been made before the jury were impanelled, if he had a right to make it at all, as, by the fifth section of the statute, a right is given of challenging any juror interested in a similar question, either as proprietor or occupant; which right the defendant in review was deprived of exercising in the present case.

Wilde, for the plaintiff in review. The statute provision applies to all actions that had been, as well as those that should thereafter be, commenced; and by a fair construction includes all causes which were thereafter to be tried by a jury. The same objection would lie, and perhaps with equal force, to the allowance of this claim upon the trial of an action brought here by appeal, where the party was dissatisfied with the estimate made by the jury below. The issue would still be the same; yet he would be entitled to another investigation by the jury here. The objection that the motion was made after the jury were impanelled was not much insisted on at the trial, nor indeed can it have much weight now; for if the defendant in review prevails in his motion for a new trial, the plaintiff in review will have opportunity to make his motion before impanelling the jury.

By the Court. One question arising in this case is, whether the plaintiff in review is entitled to the benefit of the provisions of the

limitation and settlement act ; that act having passed since judgment was rendered in the original action for the defendant in review, who was the original demandant. And we are all of opinion that he is not so entitled. That act was never intended to apply to trials by review, in which the merits tried before can alone be tried. Those merits are also to be tried upon the former pleadings. The effect of the statute, if it applied to trials on review, would be to prevent execution, for a reason which did not exist at the former trial.

[* 474] * If the tenant in the court below claims the benefit of the act and succeeds, and the demandant appeals, still the tenant will be entitled to the benefit of his claim below ; or, if he has not claimed it before, he may have the benefit of it on the appeal, if he claims it then. But the case of a review is quite different. Here the only questions to be tried by the jury must be comprehended in the pleadings on which the former trial was had.

The claim must in every case be made before the trial commences ; that either party may make his objections to the jurors for the causes mentioned in the statute.

The verdict, being for the defendant in review, need not be set aside. Let judgment be entered upon it, and execution issue as in due course.

JOHN BROADSTREET, Libellant, *versus* LUCINDA BROAD STREET.

Upon the suggestion of the counsel for the respondent in a libel for a divorce, that she was insane, the Court admitted the counsel to plead to the libel in the name of the respondent.

THE libel charged adultery in the wife on a day certain, and prayed a divorce from the bonds of matrimony.

Wilde suggested to the Court that the wife was insane at the time mentioned in the libel, and that she had continued so to this time ; and expressing some doubt as to the mode of his appearing in her behalf in the cause, the Court said he should be admitted to plead in her name. He pleaded that she was not guilty of the crime alleged ; and the insanity being proved to the satisfaction of the Court, the libel was dismissed.

Mellen for the libellant.

 BONNER & AL. vs. THE PROPRIETORS OF THE KENNEBECK PURCHASE.

*** RUTH BONNER AND OTHERS, Petitioners for Partition,
versus THE PROPRIETORS OF THE KENNEBECK PURCHASE.**

A petition for partition lies only for a person who has a seisin in fact of the premises.

It appearing in this case that the share in the *Kennebeck* purchase, which the petitioners claimed to have set off to them in severalty, had been sold more than forty years since, for non-payment of an assessment voted by the proprietors, and that the purchasers, under the sale, had been ever since in possession; the Court observed that this process lies only for persons actually seised, and the petitioners became nonsuit.



PHILIP COLBY versus PITT DILLINGHAM AND OTHERS.

A coroner, who is also deputy sheriff, may serve process upon another deputy of the sheriff.

In a case stated by the parties in this action, it was agreed that the defendant *Dillingham* is a deputy sheriff for this county; that the original writ in the action was directed to the coroners of the county, or any of them, and was served on all the defendants by *Daniel Evans*, a coroner for the county, duly qualified, and also a deputy sheriff of the same county, occasionally executing the duties of each of those offices.

If the Court should be of opinion that *Evans* could serve said writ, and that the service thereof by him as coroner, was correct and legal, it was agreed that judgment should be rendered for the plaintiff for a sum stated; otherwise the plaintiff should become nonsuit, and the defendants recover their costs.

The Court observed that it was improper to bring a matter, which, if there was any question upon it, was proper for a plea in abatement to the writ, before them in the form of a case stated. But, as the question regarded practice, and they entertained no doubts upon it, they would express their opinion, that *Evans*, in his

character of coroner, might well serve the writ. The sheriff was answerable for his conduct as one of his deputies, but not for his doings as a coroner.

Judgment for the plaintiff.

[* 476]

* NATHANIEL DUMMER *versus* ICHABOD FOSTER.

The provision of the statute of 1807, c. 122, limiting costs to one quarter of the damages recovered in actions commenced in the Common Pleas, where the damages do not exceed twenty dollars, does not extend to actions of trespass *quare clausum fregit*.

THIS was an action of trespass *quare clausum fregit*, originally commenced in the Common Pleas for this county. It appeared that, on the trial, which was had upon the general issue, at the last October term in this county, before *Thatcher, J.*, the title of the plaintiff to the close, in which the trespass was committed, was not questioned. The jury returned a verdict in the plaintiff's favor for nineteen dollars and fifty cents damage.

After the verdict, the plaintiff moved that he might tax full costs; and the action stood over for the consideration of that motion.

And now, at this term, *Wilde* renewed the motion, and the action was continued *nisi* for the consideration thereof. At an adjourned session of the March term, in *Suffolk* county, which was holden in August of this year, the *Chief Justice* observed that the Court had considered the statute of 1807, c. 122, under which the question in this case arose, and the result was, that as the second section of the statute excepts all actions, wherein the title to real estate *may* be concerned, and as in all actions of trespass *quare clausum*, the title to real estate *may* be concerned, the Court were unanimously of opinion, that the provision of the statute, directing that in cases where, in actions originally brought before the Court of Common Pleas, judgment shall be recovered for no more than twenty dollars debt or damage, the plaintiff shall be entitled for his costs, to no more than one quarter part of the debt or damage so recovered, does not apply to actions of trespass *quare clausum fregit*, but that full costs are to be allowed the plaintiff in such actions, although he may recover a less sum than twenty dollars in damages

Mellen and *Warren* for the defendant.

* SAMUEL RUNLET *versus* EBENEZER T. WARREN.

Bail was holden, notwithstanding the execution against the principal was made returnable at an earlier day than by law it should have been

THIS was a writ of *scire facias* against the defendant, as bail for one *John H. Dearborn*.

The plaintiff alleges, in his writ, that he recovered judgment against *Dearborn*, at the October term of this Court, in the year 1809, for 111 dollars 83 cents damage, and 105 dollars 18 cents costs; that execution issued thereon on the 21st day of the same October, which was made returnable in six months from its date, and was duly delivered to *J. F.*, a deputy sheriff, to be executed; that *Dearborn* hath not abode the said judgment, but has avoided the same, so that he could not be found; that the deputy sheriff returned the execution at the end of the six months, with his return endorsed thereon, that he had made diligent search for the body and property of *Dearborn*, and could find neither, and therefore he returned the execution in no part satisfied; and that the said judgment is still unsatisfied. Whereupon the defendant is summoned to show cause, &c.

The defendant pleads in bar that there are two terms of this Court established to be holden annually in this county, *viz.* one in May, and one in October; and that the plaintiff's execution ought to have been returnable to the May term then next, and not at the end of six months from the issuing thereof.

To this plea in bar the plaintiff demurs generally, and the defendant joins in demurrer.

Mellen, for the plaintiff, insisted that the defendant could not avail himself of this mistake of the clerk; and he cited the cases of *Cholmondely vs. Bealing*, (1) and *Ball vs. Manuaptors of Russel*. (2)

The writ avers that the principal avoided, and that neither his body nor his property could be taken, which is confessed by this plea in bar; and this is all that is required by the statute, (3) to fix the obligation of the bail to satisfy the judgment out of his own estate.

* *Wilde and Bond*, for the defendant, insisted that the [*478] bail was injuriously affected by the execution against the principal being made returnable in a shorter time than by law it ought to have been, and that he ought not to be chargeable. (4)

(1) 2 *L. Raym.* 1096.

(2) *Ibid.* 1176.

(3) 1784, c. 10, § 1.

(4) 1 *H. Black.* 74. *Gawder vs. Jolley*. — *Bac. Abr. Title, Bail in civil causes, D*

In the case at bar, the *scire facias* was made returnable at the term at which by law the execution should have been returnable; an attempt was thus made to fix the bail too soon. If the principal dies before the return of the execution against him, the bail, pleading this, is discharged. But, by taking his execution returnable before the time by law established, this legal privilege of the bail was impaired. Further; the return thus prematurely made is no legal evidence that the principal was unable to satisfy the judgment, or that he was not ready to surrender himself to the officer, at the proper return day of the execution.

The action stood continued *nisi* for advisement, and at an adjournment of the March term in *Suffolk*, judgment was given for the plaintiff, the Court observing that the irregularity in issuing the execution did not make the same void; although it would have been superseded upon motion. The return of the officer was *prima facie* evidence of the inability of the principal to satisfy the judgment, and of his avoidance; and there is nothing in the case to rebut this presumption. The defendant's plea in bar is bad and insufficient.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF LINCOLN, JUNE TERM, 1811,

AT WISCASSET.

PRESENT:

HON. SAMUEL SEWALL,
HON. GEORGE THATCHER, } JUSTICES.
HON. ISAAC PARKER,

SIMEON TAYLOR *versus* JOHN BINNEY.

Where the payee of a promissory note, payable to order, and endorsed thereon,
"I guaranty the payment of the within note in eighteen months, if it cannot be collected of the promisor before that time ;" the holder, to recover against such endorser, must prove a title to the note in himself.

THE plaintiff declares upon a promissory note, dated April 26th, 1805, subscribed by—*Fales*, and payable to the defendant or his order, in six months with interest; and avers an endorsement and guaranty thereof by the defendant to the plaintiff, and due intelligence to collect the same of the promisor, and notice to the defendant of the promisor's failure of payment, &c.

At the trial, which was had before *Sewall, J.*, upon the general issue, the plaintiff gave in evidence the note declared on, and an endorsement made and signed by the defendant in these words:—
"Dec. 13th, 1805. I guaranty the payment of the within note in eighteen months, provided it cannot be collected of the promisor

before that time." There was also another endorsement upon the note in these words:—"April 15th, 1806, received one hundred dollars." The plaintiff also gave in evidence an action commenced in his name against the said *Fales*, upon the note now declared on by a writ tested January 20th, 1807, and served the 28th of the same month; also an execution tested September, 1807, [* 480] upon a judgment recovered in that * suit, and a return upon the execution by a deputy sheriff for the county of *Lincoln*, dated 27th of November, 1807, that after diligent search for the body and property of the said *Fales*, finding neither in his precinct, he returned the execution in no part satisfied.

The defendant then proved that in April, 1806, the note declared on, with the endorsement thereon, was in the hands of *Jacob Thompson*, who then commenced an action in his own name upon the said note, against the said *Fales*, upon which a quarter part of a sloop, of which *Fales* was master, was attached and holden by *Will. Bell*, a deputy sheriff, as the property of the said *Fales*; and that the said *Thompson* afterwards withdrew the said suit, and relinquished the attachment, upon receiving from the said *Fales* the sum of one hundred dollars, then endorsed upon the said note, which sum was paid by *Samuel Hastings*, who purchased the said *Fales's* quarter part of said sloop at the sum of four hundred dollars; but upon some difficulty which occurred in the transfer, refused to advance more than a quarter part of the purchase money; and afterwards paid to the seamen belonging to the vessel two hundred and twenty-three dollars forty cents, and to the said *Bell* the sum of twenty dollars for expenses and costs of suit. The defendant also proved that the plaintiff was present at the transaction between *Thompson* and *Fales*, when the said suit and attachment were relinquished, and immediately received the note of the said *Thompson*; and there was no evidence of any consideration paid for the note by the plaintiff.

Upon this evidence, the judge, who sat in the trial, directed a nonsuit, upon the ground, 1st. That the plaintiff had not proved a title in himself to recover upon the said guaranty; and, 2d. If he had proved such title, that the guaranty was discharged, and the defendant no longer liable upon it, after the said suit and attachment were relinquished by the said *Thompson*, the former holder of the note; especially as the plaintiff was present at that [* 481] transaction, *and fully informed of the state of the note, when it came to his hands. The nonsuit was entered, subject to the opinion of the Court upon the report of the judge, with liberty to the plaintiff to move for a new trial.

Mellen and Foote for the plaintiff.

Wilde for the defendant

The action being continued *nisi* for advisement, the opinion of the Court was delivered in *Suffolk*, at an adjournment of the March term in that county, by

SEWALL, J. The plaintiff having been nonsuited, with liberty to move for a new trial, the report of the evidence, upon which the nonsuit was directed, has been considered by the Court.

In the argument upon the motion for a new trial, two questions have been discussed: whether the plaintiff has entitled himself to an action in his own name, upon the endorsement and guaranty of the defendant. And whether, if so entitled, the defendant is discharged of all responsibility upon his endorsement; considering the conduct of *Thompson*, the former holder, and of the plaintiff, respecting the collection of this note from *Fales*, the promiser.

The three justices present at the argument are agreed in deciding for the defendant upon the first question; and a decision of the second question has therefore been thought unnecessary.

It is an established rule, respecting the negotiation of bills of exchange and promissory notes, that a bill, or note payable to order, is transferable only by endorsement; and what is said of a transfer by delivery, after a blank endorsement, is not inconsistent with this rule, but when explained by the usage, is entirely conformable. The usage in this particular is, that after an endorsement in blank by the payee, or any subsequent endorser, it is competent for the holder of the bill or note to make himself the immediate endorsee, and to claim by the blank endorsement. And to maintain an action upon the bill or note, the holder completes the endorsement, by writing an assignment, or order * of payment to him- [*482] self over the name of the endorser; which in the usual course of business constitutes a blank endorsement. (1)

In the case at bar, the plaintiff relies on an endorsement which is not blank in the form of it, but completed by the endorser himself. The note, with the words of the payee in his endorsement, are to be construed together as one written instrument. The special guaranty, expressed in that endorsement, is the whole ground upon which the present action against this defendant can be maintained; and the plaintiff does not rely upon any implied responsibility, resulting from an endorsement in the common form. If this endorsement, in the whole tenor of it, may be construed to be, not only a guaranty, but also a transfer and assignment of the note, which seems to have been the intention and understanding

(1) *Chitty on Bills*, 58, 59, 101, 106, 117. — *Doug.* 633, *Peacock vs. Rhodes & Al.* .
Johns. N. Y. Rep. 143, *Cock vs. Fellows*. — 4 *D. & E.* 28, *Mead vs. Young*.

of the parties, the principal objection to the title of the plaintiff remains in force. There is no name inserted of the party to be entitled by the endorsement; and if this omission might be supplied by extraneous evidence, the facts proved in the case render it certain that the present plaintiff was not the party to the guaranty or assignment, when it was made; and no evidence has been offered of any subsequent privity or assent between him and the defendant.

But the argument of the plaintiff is, that the omission of the name of the endorsee is evidence of an intention in the defendant and the other immediate party, whoever he was, to give an unlimited currency to this note, and to accompany it with the collateral promise of the payee; according to the usage and construction in ordinary cases of blank endorsements upon negotiable bills or notes. But in the case at bar there is no necessary implication to this effect, arising from the circumstance of the omission of the name of the endorsee or party to the guaranty. This may have been a mistake or accident. The negotiation was not upon the credit of

the original promisor, but wholly upon the final responsibility of the endorser; the ability of the promisor, * considering the whole tenor of this endorsement, remaining at his risk; and the assignment seems to be rather a confidence for the collection of the note, than an absolute transfer of the property. The guaranty taken independently of the note, is a promise not negotiable, being conditional, and not absolute; and connected with it, the supposition is altogether unreasonable and improbable, of an unlimited currency intended for the note itself at the risk of the endorser. (2)

The plaintiff fails, therefore, in the evidence necessary to his title, even admitting the usage cited respecting notes endorsed in blank to have any application, where the endorsement is full and restrictive, and not at all in the form of a blank endorsement, unless in the mere circumstance of omitting the name of the endorsee.

The nonsuit is confirmed, and judgment is to be entered upon it for the defendant.

(2) *Chitty*, 88. — *Com. Dig. Title Merchant*, F. 16. — 8 *Mod. Rep.* 363, *Morris vs. Lee*.

NATHANIEL FREEMAN AND ANOTHER *versus* JOHN BOYNTON

Where a promissory note was payable on the 4th, a demand made on the 10th of the month, was held to be within a reasonable time to charge the endorser, the holder of the note living two hundred miles from the promisor's place of abode.

But a demand on the promisor, and notice to the endorser, on the 3d of the succeeding month, were held not to be within reasonable time.

It is a *general* rule, that such demand must be accompanied with the note, to be delivered upon payment.

THIS was an action of *assumpsit*, brought by the plaintiffs as endorsees of a promissory note, dated at *Boston*, September 4th, 1806, by which one *Joseph Boynton* promised the defendant to pay him or his order 902 dollars 16 cents in nine months from the date, with interest after six months, and which the defendant endorsed to the plaintiffs.

On *non-assumpsit* pleaded, the cause was tried before *Thatcher, J.*, at the last September term in this county. At the trial, neither the making nor the endorsement of the note were denied; the whole question being whether the plaintiffs had used due diligence in demanding payment of the promisor, and in giving notice to the endorser, so as to make him liable.

* On this point the evidence was, that on the 9th or [* 484] 10th of June, 1807, a copy of the note, with a protest made by a notary public at *Boston*, was transmitted to Mr. *Merrill*, an attorney of this Court, living at *Wiscasset*, who immediately called on the promisor, and demanded payment, which was refused; but he gave no notice at that time to the defendant, the endorser. On the 3d of July following, Mr. *Merrill*, having then with him the original note, again called on the promisor, and demanded payment, which was refused; and on the same day, he went to the house of the defendant, the endorser, (both promisor and endorser being inhabitants of *Wiscasset*,) and informed the defendant's wife of the non-payment of the note by the promisor; and he also left a letter at the house, directed to the defendant, and giving him the same information; the defendant then being, and having been for several months, at sea.

It was further proved that the defendant, on the 19th of September following, being in *Boston*, called at the counting-room of the plaintiffs, paid them a sum of money due them on account from the said *Joseph*, observed that he had been called on to pay the note in question, and complained of the hardship of the case, that it was hard enough to pay his own debts, but said that he would

pay it as soon as he possibly could, or words to that effect. There was no change in the pecuniary circumstances of the promisor for some months before or after the said tenth of June, 1806; nor any evidence that either the maker of the note or the defendant had any place of residence in *Boston*.

A verdict was taken, by consent, for the plaintiffs, subject to the opinion of the Court upon the above facts reported by the judge who sat at the trial. If, upon these facts, the Court should be of opinion that the plaintiffs are entitled by law to maintain their action, they were to have judgment on the verdict; otherwise the verdict was to be set aside, and they were to become nonsuit.

Mellen, for the defendant, contended that the protest made at *Boston* was entirely nugatory, and could have [* 485] * no effect. The promisor and endorser both living in *Wiscasset*, the plaintiffs should have sent the original note thither by mail, for the purpose of demanding payment of the promisor and giving the necessary notice to the endorser. A demand of payment on a copy of a negotiable security was no legal or sufficient demand. And even this was too late. The note was due on the 4th of June, and no demand or notice of any kind was made or given until the 10th. (1) Then, if the notice and demand made on the 3d of July, was in point of form sufficient, it was so out of all time that the plaintiffs can hardly rely with seriousness upon it. If a month's delay may be excused, and a party still be held liable, no limits can be set within which notice must be given, and all the principles as to this point have no weight.

Further; the person making the demand ought to be legally authorized to receive the money due, which is not found to have been the case here. As to the after-promise made to the plaintiffs in *Boston*, it was made under a total ignorance, on the part of the defendant, both as to law and fact, and ought not, on any principle, to be held binding upon him, and especially as his original engagement was but a conditional one.

Wilde, for the plaintiffs, insisted that, as the defendant was at sea when the note arrived at maturity, and continued so until after the notice was given, and as the promisor continued in good circumstances until long after, the notice was to every beneficial intent seasonable and sufficient. And if it was not, he afterwards waived all exceptions to it, by his new engagement at *Boston*. When he made that engagement, he well knew all the facts; and his ignorance of law will not excuse him from fulfilling an express promise,

(1) 4 *Mass. Rep.* 245, *Jones vs. Fales*. — *Ibid.* 341, *May vs. Coffin*. — *Chitty on Bills* 96, 97, 99, 102. — 1 *D. & E.* 712, *Goodall vs. Dolley*. — 5 *Burr.* 2670, *Blesard vs. Hirst & Al.*

fair and honorable in itself. It is a pretence that any one may make, and which, in common cases, is not easy to be disproved.

The opinion of the Court was delivered to the following effect, by

* PARKER, J. The question submitted to the Court [* 486] in this case is, whether the plaintiffs have made use of due diligence, in demanding payment of the promisor, and in giving notice to the endorser, so as to make him liable. (Here the judge recited the facts from the report of the trial, and proceeded.)

The demand made by Mr. *Merrill*, on the ninth or tenth of June, was seasonable; for, as the holders of the note lived in *Boston*, and the promisor and endorser at *Wiscasset*, a distance of near two hundred miles, a reasonable time should be allowed, after the note became due, to transmit it, the endorsees having a right to wait for payment to them in *Boston*, before they were obliged to follow the maker to his home, to make the demand.

But this demand was ineffectual for two reasons — 1. Because *Merrill* had not the note with him, to deliver it up on receiving payment; and, 2. Because no notice was given to the endorser of the refusal to pay.

Whenever a demand of payment is made, the person making the demand should have with him the evidence of the debt; for otherwise the debtor may well refuse to pay, on the ground that he has a right to have his obligation or contract, or to see it cancelled, when he is called upon to discharge it. And this rule will especially apply to negotiable securities, which may be legally transferred to another, at the very time the original payee makes his demand of payment.

This rule may admit of exceptions; as, where the security may be lost; in which case a tender of sufficient indemnity would make the demand valid, without producing the security; and where, from the usual course of business, of which the parties are conusant, the security may be lodged in some bank, whose officers shall demand payment and give notice to the endorser, according to the custom of such banks; the security not being presented at the time of the demand, but the parties being presumed to know where it may be found.

* There is nothing in this case, whereby an ex- [* 487] ception to the general rule can be created. But had this demand been sufficient, still it would not affect the endorser, he having had no notice whatever that it had been made.

The objection to the demand, on the ground that Mr. *Merrill* had not a letter of attorney from the endorsees, would not have prevailed; a letter, or even a verbal request, from the holders of

the note being sufficient to authorize him to make the demand, if he had held the note, and been able to deliver it up on receipt of its contents.

Then the question is, whether the demand made by *Merrill*, with the original note in his hand, on the 3d of July, 1807, which wanted but one day of being a month after the note became due, and of which, and of the refusal to pay, immediate notice was given to the endorser, in the best manner circumstances would admit of, he being absent at sea, was within a reasonable time, so as to charge the endorser. And we are all of opinion that it was not; there being no sufficient excuse given for so long a delay, a regular mail being established between *Wiscasset* and *Boston*, by which letters may be safely transmitted in a time not exceeding three days.

Even if the mistake of the plaintiffs, in not sending down the note when they directed the first demand, or of *Merrill* in neglecting at that time to notify the endorser, should have authorized a subsequent demand, in order to charge the endorser, yet no reason whatever can be furnished for suffering twenty-five days to elapse between the two demands. It is important to the interest of the community, that the law, which requires diligence in the holder of securities, to enable him to exact payment, from one who is only conditionally liable, should be strictly enforced.

But the plaintiffs have further relied upon a supposed demand made by a notary at a house in *Boston*, where the promisor had once boarded. This was altogether nugatory, it appearing from the report that both promisor and endorser lived at *Wiscasset*; and it not appearing that the promisor had any place of business [* 488] in *Boston*, or that the note * was payable there. And even if any weight could possibly be attached to this kind of demand, it could not avail against the endorser, for he had no notice of it.

Nor will any supposed acknowledgment of the endorser, that he was liable to pay the note, avail the plaintiffs in the present case. The facts reported do not show any direct promise to pay; and even if they did, it is well settled (2) that a promise under such circumstances, as show an ignorance that the party was legally discharged, is without consideration and void. (a)

We are all, therefore, of opinion, that the verdict must be set aside, and the plaintiffs become nonsuit.

(2) 5 Burr. 2760. — 1 D. & E. 712. — *Chitty*, 102, ante, 452, *Wardor & Al. vs. Tucker* (a) [See note to *Wardor vs. Tucker*, ante, 452, and case there cited, to show that a mistake of the law is of no consequence in such a case. — Ed.]

HENRY KNOX AND ANOTHER *versus* DAVID JENKS

Heirs at law, creditors, and others, interested in an estate sold by executors, &c., under a license from a court, are not concluded by such sale, unless every essential requisite, and direction of law respecting the same, has been faithfully complied with; except after long acquiescence. But, strangers having no privity of estate or interest affected by such sale, cannot question the proceedings of an executor, &c., otherwise duly authorized, and whose deed, made, or recited to be made, upon a sale pursuant to such authority, is produced.

Of the effect of a deed of conveyance of land, when a stranger is in possession of the land conveyed. [A feoffment by one out of possession, with livery upon the lands, will vest the freehold in the feoffee; *aliter* in the case of a deed, bargain and sale, or other conveyance. — Ed.]

THIS was a writ of *entry sur disseisin*, in which the demandants counted upon the seisin of *Henry Knox*, whose heirs they are, of four fifth parts of the premises described in the declaration, and upon a disseisin by the tenant, who pleaded the general issue, that he never disseised the said *Knox*, deceased. This issue, being joined by the demandants, was tried before *Thatcher, J.*, at the last September term in this county.

At the trial, the demandants, to prove such seisin as to two fifth parts, produced the deed of *Samuel Waldo, Esq.*, and others, to said *Knox*, deceased, bearing date October 11th, 1793, and recorded October 22d, 1794; and it was proved that the grantors in said deed owned the said two fifth parts, at the time of making and executing the deed. On the 29th of November following, the grantors, by their attorney, who was duly appointed to enter on the land, demanded, and thereon to deliver said deed, entered on the land, and delivered possession thereof, to the attorney of said *Knox*, deceased. To prove said *Knox's* seisin, as to *the [* 489] other two fifth parts of the premises demanded, the demandants proved, that on the 15th of February, 1765, *Thomas Flucker* became seised thereof, and continued so seised, until all his estate was duly confiscated to the use of the now commonwealth of *Massachusetts*, he being a conspirator; that said *Knox*, deceased, was, by the legislature of the commonwealth, appointed agent to settle said *Flucker's* estate, to pay his debts, and make sale of his property for the use of the commonwealth; conforming in such sale to the law relating to and directing the sales of estates by executors and administrators; that he was duly licensed by the Supreme Judicial Court to sell, and gave the bonds required by law; that he took the oath by law required, which was administered at *Philadelphia* by *James Iredell*, one of the associate justices of the

Supreme Court of the *United States*, on the 25th of March, 1791, he certifying such oath in the *above capacity* only ; that due notice of the intended sale was given, as by law required ; that on the 2d of July, 1791, the said two fifth parts were sold at auction to *Oliver Smith*, from whom, by several mesne conveyances, they were at length conveyed to the said *Knox*, deceased, by a deed dated the 5th of October, 1792.

On the part of the tenant, it was in evidence, that on the 2d day of June, 1785, one *Jonathan Spear* conveyed the lands described in the writ, with warranty, to *Jenks*, the tenant in fee, by a deed recorded on the 7th day of November following ; that the said *Jenks* entered under his deed, improved and lived upon the said land, erected a dwelling-house thereon, and gradually extended his improvements, and in the year 1793 had as much as twenty acres of the land enclosed and under cultivation.

The counsel for the tenant contended at the trial, that the deed from *Waldo* and others, dated in October, 1793, could not legally operate to pass any estate to *Knox* in that part of the land improved and enclosed as aforesaid ; and that the certificate of Justice *Iredell* was not legal proof that said *Knox* was sworn according [* 490] to law, inasmuch as it did *not appear that said *Iredell* was a justice of the peace ; whence it was insisted that nothing passed by the deed of *Knox* to *Smith*.

The judge who sat in the trial delivered his opinion that the said objections could not avail the tenant ; and that upon the facts disclosed the demandants were entitled to recover ; and the jury found a verdict for them accordingly.

The tenant's counsel filed his exceptions to the opinion thus given by the judge, and the action was thereupon continued to this term. And now,

Mellen supported the exceptions taken at the trial ; and he contended that, as *H. Knox* was required, by the resolve of the legislature authorizing him to sell the land, to conform in all things to the general laws of the government respecting the sale of lands by administrators, &c., (1) he was bound to take the oath before some justice of the peace. Whether Judge *Iredell* was or was not a justice of the peace, in the place where he administered the oath in this case, does not appear. But it does appear that he did not act, or claim to act, as such in this case. *Knox*, then, had no legal authority to make the deed, and of consequence it had no legal effect to pass the land.

Then, as to the part claimed under the deed of *Waldo* and others,

(1) Vide *Stat.* 1783, c. 36, § 1, 7.

the present tenant was then in full and quiet possession of the land, and, the grantors being disseised, nothing passed by their deed at the time of making it. And although the case finds an attorney was constituted to enter on the land, and there to deliver the deed, yet it does not find a delivery of the deed by him, but of the land only. Indeed the deed appears to have been delivered at the time of its execution, when the grantors were out of possession, and so the delivery void. But if a second delivery had been made by the attorney on the land, yet this would have had no operation, unless the deed had been a feoffment. (2)

* *Wilde*, for the demandants, contended that, as to the [* 491] first point, there was little or no weight in it. The act requiring these formalities had always received a liberal construction, and although a justice of the peace was the officer named, yet an oath taken before any magistrate authorized by law to administer oaths, is sufficient within the spirit and intent of the statute. But this oath is prescribed for the security and benefit of heirs and creditors only; and a mere stranger, who is a disseisor and wrongdoer, has no right to bring the subject into question.

As to the second point, it was not started at the trial, or it would have been cured by the jury. But the deed was not probably twice delivered. If it was delivered at the time of its execution, there ought to have been proof of it; for the attestation made by the witnesses is merely matter of form, and always so considered. To support the deed, it will be considered as a feoffment at common law, the delivery of which before possession is valid, if livery of seisin be afterwards made.

The opinion of the Court was delivered to the following effect, by

SEWALL, J. Upon the exceptions filed in this case, two questions have been made and argued — one respecting the operation of the deed from *Samuel Waldo* and others to the late General *Knox*, dated October 11, 1793; and the other respecting the operation of the deed made by General *Knox*, as agent of the estate and effects of *Thomas Flucker*, a conspirator, dated July 2, 1791; the demandants claiming as the heirs at law of General *Knox*, and having counted upon his title and seisin in the demanded premises, and these depending altogether upon the operation of those deeds. The last-mentioned deed, which is the first in order of time, having been executed by General *Knox*, upon a sale, as agent for the confiscated estate of *Thomas Flucker*, the tenant objected, at the trial, to a certificate by Justice *Iredell*, one of the justices of the Supreme Court

of the *United States*, before whom, as it appears by [*492] * the certificate, General K. took the oath required by law of executors, administrators, guardians, and agents for the estates of conspirators and absentees, when licensed and authorized to make sale of real estate for the payment of debts, to be taken previous to the sale. The certificate was admitted in evidence, and the decision upon it at the trial was, that this objection could not avail the tenant; and to this decision the counsel excepts.

As to the admission of the certificate, by which the competency of it to prove the qualification required may be understood to be determined, we are not now prepared to give an opinion. A decision to that effect may require more time and consideration. We are, however, agreed in confirming the decision at the trial, that this objection cannot avail the tenant, supposing the certificate incompetent as proof of the oath by law required, or that the sale was by an agent, who had not previously taken the oath. The requisites provided by statute, of bonds to account, of a previous oath, of advertisements, and of a public sale, are important to the interests of all concerned in the estate to be conveyed, as heirs at law, creditors, and others.

The rights of persons thus connected with the estate conveyed, and whose interests are affected by the authority to sell, are regarded by these provisions; and they, and any claiming under them, are not concluded by the exercise of the authority and license to sell in derogation of their rights, unless every essential requisite and direction of law, in this respect, has been faithfully complied with. But even heirs and creditors are concluded after a long acquiescence; and a legal presumption of the regular exercise of the authority is accepted instead of proof. (3) And strangers to the title, those who have no estate, or privity of estate or interest, and who pretend to none, affected by the sale in question, are not entitled to proof of the proceedings of an executor, administrator, or agent, otherwise duly authorized to sell, and whose deed made, or recited to be made, upon a sale pursuant to that authority, is produced.

[*493] * A seisin may be obtained under such a deed by the grantee named therein, and his entry under it upon a disseisor of the estate, or of the feoffee of a disseisor, is lawful, and will revest the possession according to the title. No particular decision to this effect is at this moment recollected; but we are all satisfied, that this has been the practical construction of the statutes upon this subject in this respect. (4)

(3) 3 *Mass. Rep.* 399, *Gray vs. Gardner*.

(4) Vide *Willard vs. Nason*, in error, 5 *Mass. Rep.* 240.

KNOX & AL. vs. JENKS.

As to the other objections against the deed of *Samuel Waldo* and others, we think it is by no means a necessary conclusion, from the tenor of the writings produced in the case, or from the facts stated to have been proved at the trial, that the delivery of the deed was previous to the entry upon the land conveyed; and which the tenant then occupied, claiming under a deed to him, made by one *Jonathan Spear*, and dated June 2, 1785. The right of entry certainly remained in the grantors in October and November, 1793, when it may be supposed their deed to *Henry Knox* was executed, and when their attorney entered upon *Jenks*, and delivered possession of the lands conveyed to the attorney of General *Knox*, the grantee. The attorney of the grantors was specially authorized to enter upon the land demanded, and thereon to deliver their deed. The entry and delivery of possession, with reference to the authority, and in the execution of it, affords a reasonable presumption of a delivery of the deed, after the entry and the removal of the impediment; and because, in the understanding of the parties, according to the purport of these writings, a delivery at the date would have been ineffectual, while the impediment to the operation of the conveyance continued; and no evidence is stated more than the legal presumption from the date of the deed, that there had been a prior delivery of it as the deed of the grantors. This is a construction upon the facts in evidence, in furtherance of the plain and declared intentions of the parties.

But, supposing this construction not admissible, there is another suggested in the argument for the demandants, by * which the intended operation of the deed of *Waldo* and [* 494] others may be maintained. A deed acknowledged and recorded is valid to pass the lands conveyed, without any other act or ceremony. A feoffment by a feoffer out of possession, and a livery on the estate conveyed, bring back the estate, and vest the freehold perfectly in the feoffee—an operation, which, it seems, is not allowed to a deed of bargain and sale, or any other mode of conveyance. (5) If necessary, then, to effectuate the intentions of the parties, we see no difficulty in construing the deed in question a feoffment, with livery of seisin upon the land conveyed. No precise words are requisite to a feoffment; (6) and here was a livery in fact, according to the deed; or, if that ceremony had been wanting, it would be supplied by the statute effect from an acknowledgment and registry, the impediment to the operation of the deed having been removed by an actual entry upon the land conveyed.

(5) *Com. Dig. Feoffment, A. 1. — Co. Lit. 48, b. 49, a.*(6) *Com. Dig. Feoffment, A. 3. — 2 Roll. 73.*

The opinion of the Court is, that the demandants are entitled to recover, notwithstanding the objections stated in the exceptions; and judgment is to be rendered according to the verdict.

DAVID SHAW *versus* DAVID GRIFITH.

Any credit given by the endorsee and holder of a promissory note to the promisor or endorser, is a consent to hold the demand on their responsibility alone.

ASSUMPSIT by the endorsee of a promissory note, payable on demand, against the endorser.

Upon a trial had, upon the general issue, before *Thatcher, J.*, at the last September term in this county, it was in evidence that the note, which was dated Oct. 14th, 1805, and made by one *Charles Shaw*, payable to the defendant or his order on demand, was endorsed in blank, and delivered over by the promisee to one *B. Kimball*, who, in January, 1806, presented it to the maker for payment, who was insolvent, but in about a month afterwards paid a part of the sum due upon it to *Kimball*, who afterwards transferred it, for a valuable consideration, to the plaintiff, but without endorsing [* 495] his name upon it. In the spring of 1807, * the plaintiff demanded payment of the maker, and in the spring of 1808 made a like demand on the defendant.

Upon this evidence, the judge directed the jury that the defendant was entitled to their verdict, and they found accordingly. The plaintiff filed exceptions to the said direction, and the action stood over to this term for judgment.

Greenwood, for the plaintiff, cited the case of *Eunson and Others vs. Healey and Trustee*, (1) as supporting his exceptions.

Orr for the defendant.

Per Curiam. The exceptions in this case are made against principles long settled by a variety of decisions. The general principle, that an endorser of a promissory note engages conditionally only, and becomes responsible according to the usages among merchants in the negotiation of bills of exchange and promissory notes, and not otherwise, is decisive of this case. Any credit by the endorsee and holder, to the drawer, acceptor, prior endorser or promisor, is a consent to hold the demand upon their responsibility; and the

(1) 2 *Mass. Rep.* 32.

SHAW vs. GRIFFITH.

holder has no remedy afterwards but against them, where the circumstances of the transaction have rendered them liable absolutely and at all events. (a)

Kimball, the holder of this note under the endorsement of the present defendant, when it had been due about three months, demanded payment of the maker, but without success; and no notice was given to the defendant of the maker's neglect or inability to answer the demand. But the note was retained, and a partial payment received afterwards from *Shaw*, the maker; and, according to the facts stated in the exceptions, the present defendant had no notice that he was looked to, or his credit relied upon, for the balance of this note, until the spring of 1808, more than two years after the first demand of payment.

Upon these facts, the present defendant, as endorser, was discharged from all responsibility in consequence of *Kimball's* neglect in demanding payment of the promisor, and in * notifying the endorser. The subsequent negotiation, [* 496] or delivery of the note to another party, could not alter the state of the demand, or renew in any manner the liability of the present defendant.

Judgment is to be entered according to the verdict.

(a) [The holder does not lose his claim upon the endorser, unless he agree to give time to the maker, or person first answerable, so as to preclude himself from suing him and thereby suspend his remedy for a time.— *Chitty on Bills*, 8th ed. 442 — Ed.]

—◆—

MOSES KING versus PETER KING.

Where land lying on each side of a river was owned by tenants in common, and they made partition of the same, by assigning the land on one side of the river to one, and that on the other side to another, it was held that the two tracts were to be considered as separated by the thread or central line of the river.

THIS was a writ of *entry sur disseisin*, in which the demandant counted upon his own seisin of "three undivided eighth parts of that certain part of the mill privilege at and upon the great falls of *Sheepscut* river, which lies eastward of the centre of the said river," and upon a disseisin by the said *Peter* on the day of the purchase of his writ.

The action was tried upon the general issue before *Thatcher*, J. It appeared at the trial that *Benjamin King*, father of the demandant, and also of the tenant, was seised of two tracts of land, situate

opposite to each other, on the east and west sides of the river, and adjoining thereto, conveyed to him by boundary lines which include a part of the river where it passes over falls, and forms a site for mills, and that he died seised of the same. It further appeared that upon these falls the said *Benjamin*, in his lifetime, had erected a saw-mill and a grist-mill on the western side of the river.

After the death of the said *Benjamin*, the tenant, together with his two brothers, *Elijah King* and *Benjamin King*, by their deed, dated the 12th of April, 1802, released to the demandant a lot of land on the west side of the river, being part of the aforesaid tract of which their father died seised, also all their right in and to *three fourths of a saw-mill standing at the great falls on said Sheepscut river, and to three fourth parts of said mill privilege and yard, (saving and excepting the privilege of the grist-mill, and so much* [* 497] *of the yard as will accommodate the same,) the * said mill yard being bounded easterly on the said Sheepscut river, and westerly on the before-mentioned lot released to the said Moses, and containing one acre, more or less.*

By another deed of the same date, the demandant, with his two brothers, *Elijah* and *Benjamin*, released to the tenant one fourth part of the grist-mill, mill yard and privilege, mentioned in the other deed, also two tracts of land on the east side of the river, and adjoining thereto, one of which tracts is bounded as follows : — Beginning at a stake and stones at *Sheepscut* river, thence south-east two hundred and fifty rods, thence north-east fifty rods, thence north-west to said river, thence down the river to the first-mentioned bounds.

At the trial, the demandant's counsel offered in evidence a copy of the inventory and appraisement of the estate of the said *Benjamin King*, deceased, in which the lands on the west side of the river, the lands on the east side of the river, and the mill privilege, were separately inventoried and appraised as distinct parcels of the estate ; and to prove by witnesses that the falls demanded in this action have always been known and called by the name of the *mill privilege*, and at the time of the execution of the deeds above mentioned, (which were made on the division of their father's estate among the said children,) the said privilege or mill privilege mentioned in the deed of the said *Peter King* and others to the said *Moses*, was understood and intended by the parties to describe and convey the said privilege or portion of the falls demanded.

But the judge refused to receive the evidence, and, a verdict being returned for the tenant, the demandant filed his exceptions to the decision of the judge.

And now *Mellen*, in support of the exceptions, argued that it was competent for a party to show by parole testimony what was intend-

KING vs. KING.

ed by appurtenances to the principal subject of a conveyance ; (1) and he said that the phrase *mill privilege*, which was used in the deed in the case, sometimes means nothing more than an easement, or a * right to use the water of a stream : here [*498] it was understood by the parties to that deed as describing the bed of the river, or the land over which the stream passes, and on which the mill is placed, and land adjoining and commonly used with the mill. In the case of *Hearn vs. Allen*, (2) where the question was, whether, by a devise of a house *cum pertinentiis* land four miles from the house, but occupied with it, should pass, parole testimony must have been received

Lee and *Wilde*, for the tenant, were stopped by the Court, whose opinion was the next day delivered by

SEWALL, J. *Benjamin King*, father of the demandant and tenant, was entitled, in his lifetime, to two tracts of land, situate on the east and west sides of *Sheepscut* river, described and conveyed to him by boundary lines which include a part of the river, and of course by the legal operation of his title, the falls and bed of the river, with all permanent water privileges, wherever the river flowed between the tracts of land conveyed, or covering any part thereof. It is also stated in the exceptions, that upon these falls and water privileges, on the west side of the said river, the father in his lifetime had erected a saw-mill and grist-mill ; and from the two deeds in the case, under which the parties claim exclusively of the other children and heirs of *Benjamin King*, deceased, it appears that a tract of land, also on the west side of the river, had been appropriated to these mills as a mill yard.

In these deeds the parties are recited to be the sons and heirs at law of the said deceased, and their evident intention is, and so it is stated in the exceptions, to make a partition and assignment of their father's real estate, or of that part of it which lay upon *Sheepscut* river. For this purpose, *Peter*, the tenant, with *Elijah* and *Benjamin*, release to their brother, the demandant in this action, a lot of land situate on the west side of the river, and all their right to three fourths of the saw-mill standing at the great falls, &c., *and to three fourths of said mill privilege and yard ; excepting the privilege of the grist-mill, and so much of the yard as will accommodate the same, &c. And for the same purpose, *Moses*, the demandant, with the said *Elijah* and *Benjamin*, release to their brother *Peter*, the tenant in this action, the lot of land on the east side of the river, describing it as extending by a line running north-west to the river, and thence down the river to the other bounds.

(1) *Com. Dig. Grant, E. 9.*(2) *Cro. Car. 57.*

These instruments are to be construed together; having been executed between the same parties, at the same time, and respecting the same subject matter, and therefore forming one instrument. And their most obvious import is a partition of the tracts of land adjoining *Sheepscut* river, belonging to the father; and an assignment of two parcels that lie on the western side to *Moses*, and of that on the eastern side to *Peter*; and the legal operation of this partition and assignment is, that the falls and bed of the river, and the water privileges, were alike divided and assigned, as parcel of the two tracts, which, after the partition, were to be considered as separated, so far as they lie opposite to each other upon the river, by a central line, or the thread of the river, as it is sometimes expressed.

But it is contended for the demandant, that *the said mill privilege and yard*, three fourths of which are released to him, included all the mill privileges which belonged to the father, as well those on the eastern, as those on the western side of the river. This construction militates entirely with the deed to *Peter*, which is without any exception or reservation to apply or answer the purposes of this construction. And it is certainly not a necessary construction; for the words in question are fully satisfied by their application to the mill privilege and yard then known, appropriated and occupied for the use of the saw-mill and grist-mill; and, considering the exception following in immediate connection, it would be difficult, [* 500] taking the deed to * *Moses* alone, to give to these words any other construction.

As to the motion for the admission of parole evidence, to control or aid in the construction, the Court are unanimous in the opinion that it was justly overruled at the trial. The evidence, if admitted, must have been employed upon a question of the legal construction and operation of a written contract, expressed without any reference to extraneous circumstances, or any latent ambiguity.

Judgment according to the verdict.

ANDREW LUCKFORT *versus* ABNER KEEN.

Defendants in replevin cannot stay execution by giving bond in review.

In replevin the plaintiff obtained a verdict, and judgment being rendered, the defendant offered a bond to review the action, and stay the execution.

LUCKFORT vs. KEEN.

Mellen, for the plaintiff, contended that actions of replevin, in which damages were always a subject of minor consideration, and the goods replevied were the main object of the suit, were not within the intention of the statute prescribing bonds of review; and he likened them to real actions, where a review bond is never taken to stay execution for the costs.

Wilde, for the defendant, insisted that the words of the statute, (1) were positive, explicitly including the action of replevin, and that no construction was necessary, or ought to be received. The fifth section provides, that when any defendant, entitled and intending to review, shall suppose that he will be in danger of losing the sum given in damages, *or the goods or chattels recovered*, if obliged to pay or *deliver* the same to the plaintiff, before a review, in all such cases, such defendant entering into bond, &c., with condition, among other things, if the judgment shall be upon detinue or *replevin* for any goods or chattels, then to pay all such damages as the jury shall assess for the detection, with * double costs, [* 501] if the former damages are affirmed, *then execution shall be stayed upon the judgment whereon the review is had.*

In the reasoning of the Court in the case of *Bruce vs. Learned*, (2) the above-recited provision of the statute being referred to, the Court say — “It is there enacted, that if the defendant in replevin would review, and stay execution on the former judgment, he must give bond, conditioned,” &c.

The Court took time to examine the question, and afterwards declared their opinion, that the defendant would not be entitled to a stay of execution on giving bond in this case.

(1) *Stat.* 1796, c. 66, § 5.(2) 4 *Mass. Rep.* 619.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME JUDICIAL COURT,
IN THE
COUNTY OF HANCOCK, JUNE TERM, 1811,
AT CASTINE.

PRESENT:
HON. SAMUEL SEWALL,
HON. GEORGE THATCHER, } JUSTICES.
HON. ISAAC PARKER,

WILLIAM RANDALL, Libellant, *versus* JANE RANDALL.

Where a copy of a libel and summons had been left by an officer at the last and usual place of abode of the party libelled, but it appeared that she was not then, nor afterwards before the sitting of the Court, within the county, the Court would not hear the cause until personal notice given.

THIS was a libel praying for a divorce *a vinculo*, for the cause of adultery. The libellant filed his libel in the clerk's office, and took out an attested copy, with a summons, pursuant to the statute of 1785, c. 69, § 8. The officer returned that he had summoned the respondent, by leaving an attested copy of the libel and summons at her last and usual place of abode.

There being no appearance for the respondent, the Court examined the officer upon oath, and it appeared that she was not at the house where the copy was left, and had not been within the county since the service. Upon these facts, the Court refused to

 RANDALL, Libellant, *vs.* RANDALL.

hear evidence of the principal charge, and continued the libel, that personal notice might be given to the respondent.

[*503]

*ROBERT TREAT, Plaintiff in Review, *versus* JOSHUA
HATHAWAY & AL.

Where a plaintiff in review becomes nonsuit, because no review lay in the case, the defendant shall have his costs.

THE plaintiff in review, being the defendant in the original suit, suffered judgment to go against him in that action by default. After he had entered his review in this Court, at the last term, finding that he was not entitled to it, he became nonsuit. The defendants in review moved for costs. The action stood continued upon this motion; and now the plaintiff opposed the motion, on the ground that the Court had no jurisdiction of the action of review, and could not therefore grant costs.

By the Court. This is no question of jurisdiction. It is the common case, where a plaintiff finds he cannot prevail, and therefore becomes nonsuit. Let judgment be entered that the defendants recover their costs of the review.

Mellen for the plaintiff in review.

Wilde for the defendants in review.

BENJAMIN SWETT AND OTHERS, Petitioners for Partition,
versus BENJAMIN BUSSEY AND ANOTHER.

A petition for partition does not lie, where the applicants hold the whole of the land, of which partition is prayed.

Costs may be given upon a petition for partition, where an issue in law only is determined.

THE petitioners, of which there were three, made application to the Common Pleas for this county, alleging themselves to be seised in fee, as tenants in common, of a certain tract of land described in their petition, lying in *Hampden*, in this county, stating their several shares or purparties, and praying that partition might be made of the said tract, and their respective shares set off in sev-

erality, according to the law in such case provided. The Court below ordered notice to be given in the public papers, that all persons interested might come in and show cause, &c. At the succeeding term, *Benjamin Bussey* and *Seth Kempton* appeared as [*504] respondents, and the proceedings being *removed into this Court by demurrer and appeal, the counsel for the respondents moved the Court to dismiss the petition, and that they might be severally allowed their costs.

Brown, for the petitioners, objected to the claim of the respondents for costs; and he cited the opinion of this Court in the case of *Symonds vs. Kimball* in error, (1) that the statute authorizes costs only where an issue has been joined and tried.

Per Curiam. The process provided by the statute for the more easy partition of lands, &c. (2) designates a case in which the applicant is to have a part or share, set off and divided from the rest. The case stated in this application is not of that description. The applicants, if qualified in point of age and mental capacity to maintain this process, are also competent to effect among themselves, and by their own agreements and contracts, every valuable and proper purpose, which they can be supposed to have in this petition. The notice ordered upon it is a nullity, if there is any truth in the averment of the petition that the petitioners hold in common the entire land to be divided. And if this is refuted, or made doubtful, by the order taken upon the petition at the suggestion of the petitioners, and by the appearance of the respondents to contest the fact, what further proceedings are to be had? The statute plainly implies that this process is only maintainable, where the applicant has a share only, and the respondent, or some other person not applying, had an interest, respecting which the partition by this process will be conclusive, to some purposes at least, after due notice. It will be dangerous to give a sanction of this kind to an agreement to divide, where all the parties professedly interested are the applicants for a division among themselves. The objection to the allowance of costs in this case, in support of which the case of *Symonds vs. Kimball* was cited, is not maintained by [*505] that decision; since in this case *an issue in law was in fact joined in the court below, and the judgment rendered upon that issue was the judgment appealed from.

The petitioners took nothing by their petition; and costs were ordered to be taxed for each of the respondents.

Brown for the petitioners.

Dutton and *Godfrey* for the respondents.

(1) 3 Mass. Rep. 299.

(2) Stat. 1783, c. 41.

MARTIN BLAKE *versus* MASON SHAW.

A sheriff is answerable only for the acts of his deputy done while the relation between them continues ; therefore, where a deputy of a former sheriff had attached goods on mesne process, and afterwards, being the deputy of the present sheriff, refused to serve the execution upon them, the former sheriff was not liable.

If a deputy sheriff has attached goods on mesne process, and afterwards the creditor, having obtained execution, require the deputy sheriff to deliver the goods attached to him, so that he may procure his execution to be levied upon them, the deputy is not bound to deliver them, he being accountable for them.

THIS was an action of the case against the defendant, late sheriff of this county, for the default of one *John Balch*, who was his deputy. It was submitted to the opinion of the Court upon the case stated, containing, in substance, the following facts : —

The plaintiff, in April, 1806, purchased out of the clerk's office of the Court of Common Pleas for this county a writ of attachment against one *Samuel Greenleaf*, and delivered the same to *Balch*, to be served and returned. He returned an attachment of certain goods, which he described, and stated to be of the value of 330 dollars. In March, 1808, the defendant was superseded in the office of sheriff by *George Ulmer, Esq.*, by whom *Balch* was also appointed a deputy. In June, 1808, the plaintiff obtained judgment against *Greenleaf*, and, having sued out his execution thereon, delivered the same to *Balch*, to be by him executed and returned, and directed by him to levy the same upon the goods which he had attached on the original writ. *Balch* neglected to levy the execution on those goods, or to expose them to the creditor, so that he could cause them to be levied upon. The present action was commenced before the return day of the execution. In the declaration, the plaintiff alleges that he presented the execution to *Balch*, and requested him to expose and * deliver to the plaintiff [* 506] the goods attached, as aforesaid, so that the plaintiff could procure a levy of the execution upon them, in part satisfaction of the same.

If, upon these facts, the Court should be of opinion that the plaintiff's action was maintainable, the defendant agreed to suffer judgment by default for a sum liquidated ; otherwise the plaintiff was to become nonsuit.

Dutton for the plaintiff.

Wilde for the defendant.

By the Court. The cause of action, or the complaint of the

 BLAKE W. SHAW.

plaintiff, as stated in the declaration in this case, is not a default or neglect, for which the defendant is liable.

It is not the duty of a sheriff, and indeed it would be contrary to his duty, to deliver up goods holden by attachment, to the creditor therein, even after his demand is ascertained and sanctioned by a judgment. Goods attached are in the legal custody of the officer, and he is accountable for them, no less to the supposed debtor than to the creditor in the writ of attachment; and the general property in the goods is not changed, until a levy and sale by execution. (1)

There is therefore no *gravamen* alleged in the case at bar; the averment being a refusal to deliver to the plaintiff, upon his demand of them, the goods attached in his suit, even supposing *Balch* to have been chargeable with it while he was a deputy of the defendant. Nor was that demand enforced at all by his showing an execution upon his judgment recovered against *Greenleaf*, whose goods had been attached. His property in the goods continued, subject to the lien created by the attachment, until a sale by further proceedings in due course of law.

And as to the liability of the defendant, we may go further in this case, and suppose the allegation intended, or which might be made, to amount to a charge of a refusal to do execution upon the goods which *Balch*, while the deputy of *Shaw*, had returned as attached at the suit of the plaintiff. This refusal to [* 507] serve an execution delivered * or offered, after the removal of the defendant from his office, when he himself had no longer any authority to levy and sell the goods, and the relation of sheriff and deputy between the defendant and *Balch* had entirely ceased, was not a breach of duty for which the defendant could in any manner be charged.

If, respecting the goods returned on the writ of attachment at the suit of the plaintiff, *Balch* was guilty of a false return, or if, after the attachment made, and while the defendant was in office, having *Balch* for his deputy, there was any negligence or misfeasance to the injury of the plaintiff, or producing the loss of his attachment, for an injury of that description the defendant is liable; but the circumstances essential to his liability are to be averred and proved

Plaintiff nonsuit.

(1) *Cro. Eliz.* 504, *Thomson vs. Clerk.* — 1 *L. Raym.* 251, *Smallcomb vs. Cross & Al* 424

ABRAHAM BOODEN *versus* JOSHUA ELLIS.

Where it appears to the court that justice has been done by a verdict rendered in an action, which, in point of form, was improper, they will not disturb such verdict, but judgment shall be entered upon it.

TROVER for a quantity of cord-wood. At the trial before *Thatcher, J.*, at the sittings here after the last June term, the plaintiff, in support of his declaration, produced evidence to show that he put on board the schooner *Laura*, owned by the defendant, forty-one cords of wood, to be carried from *Penobscot* to *Boston*, on freight, the master, *John Booden* to account to the plaintiff for one half of what the wood should sell for in *Boston*. In the prosecution of the voyage, the master was lost, and the vessel stranded near *Newburyport*. The defendant, who lives in *Boston*, hearing of the misfortune, went to *Newburyport*, where the vessel lay, and took charge of her and her cargo, part of which he sold at *Newburyport*, and carried the remainder to *Boston*, where it was sold by him. Before the plaintiff commenced this action, he made a demand of the wood of the defendant.

* If the Court should be of opinion that trover is main- [* 508] tainable upon these facts, then the verdict, which was in the plaintiff's favor, was to stand ; otherwise the plaintiff was to become nonsuit, and the defendant recover his costs.

Abbot, for the defendant. From the facts in this case, it appears that there existed a contract between the plaintiff and *John Booden*, the master, by which the latter had undertaken to carry the wood to *Boston*, and to account with the plaintiff for one half of the proceeds thereof. It is, then, certain that, if the master had proceeded to *Boston*, and had there sold the wood, he would not have been answerable to the plaintiff in trover. The master was the agent of the defendant, who, upon his death, assumed and performed his duties ; and no action will lie against the principal, which could not have been maintained against the agent. The selling of a part of the cargo at *Newburyport* must be considered to arise from necessity, and does not alter the case. There is, in fact, no evidence of a *wrongful conversion*, without which this action cannot be supported.

This objection to the form of the action was taken at the trial and the plaintiff ought then to have been nonsuited. In all cases, where the judge misdirects in a point of law, the Court will grant relief to the party injured. (1) The proper remedy in this case

(1) 5 *Mass. Rep.* 365, *Boydén vs. Moor.* — 6 *D. & E.* 125, *Savignas vs. Rooms*

would have been an action to account, or for money had and received; and it is important that the boundaries between the different actions should be preserved.

Wilde, for the plaintiff, argued that the case found a demand and refusal, which was sufficient for the jury to infer a conversion. By refusing satisfaction, the defendant rescinded the contract, and became answerable for a tort.

But, even allowing that the plaintiff mistook the form of his remedy, if, upon the whole, justice has been done between the parties, the Court will not disturb the verdict, and turn the plaintiff over to a new action, which will issue in the very same judgment as that which will follow the present verdict. (2)

[* 509] * *Curia*. We think the form of action adopted in this case liable to many objections, under the particular circumstances. But we are all agreed that, when justice has been done in the form of an action, upon which the verdict has been found, it is not in our discretion, nor are we required by the agreement of the parties, to disturb the verdict upon a question of form only; and especially where, in adjusting the demand, the defendant has had every advantage, which he could have had, or could claim, under any other form of action. (a)

Judgment on the verdict.

(2) 2 *Burr.* 936, *Foxcroft & Al. vs. Devonshire & Al.*

(a) [*Graham on New Tr.* 341, 357, 360. But the Court seems to have disregarded the only point reserved, and the terms upon which it was reserved, and to have turned off the case upon another ground, which was not open for argument. — Ed.]

C A S E S

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF BERKSHIRE, SEPTEMBER TERM, 1811,
AT LENOX.

PRESENT:

HON. THEODORE SEDGWICK,	}	JUSTICES
HON. SAMUEL SEWALL,		
HON. ISAAC PARKER,		

MATTHEW BARBER AND RUTH BARBER, his Wife, Adminis-
trators, *versus* DAVID BUSH.

Where a feme sole is sole executrix or administratrix, and marries, the husband becomes joint executor or administrator with her.

CASE upon a promissory note made by the defendant to *Elizabeth Bush*, upon whose estate the said *Ruth*, when sole, was appointed sole administratrix. The said *Matthew* having since intermarried with her, the action was brought in their joint names, as administrator and administratrix.

The defendant prays over of the letter of administration, and pleads in abatement to the writ, that the said *Matthew* is not, nor ever was, administrator, &c., but that the said *Ruth* is sole administratrix, &c.

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The plaintiffs reply their intermarriage, by virtue whereof the said *Matthew* became administrator in the right of his wife, traverse that the said *Ruth* is sole administratrix, and tender an issue to the country.

The defendant demurs, and the plaintiffs join in demurrer.
[* 511] * *By the Court.* The sole question is upon the writ.

Where a feme sole executrix or administratrix, jointly with one or more persons, and afterwards intermarries, her power and authority is, by the statute of 1783, c. 24, § 19, extinguished and determined. But here the wife was sole administratrix; and by the marriage the husband became joint administrator with her.

Gold for the plaintiffs.

Hayden for the defendant.

Respondeas ouster awarded.

JAMES FREELAND *versus* OLIVER RUGGLES
AND SILAS PEPOON.

To an action of debt on a review bond, the condition of which was that the judgment debtors should pay such sum as the judgment creditors might recover on the review; the defendants, after oyer of the bond and condition, plead in bar, that they have performed all things on their part to be performed: the Court held the plea to be bad, and gave judgment for the plaintiff.

DEBT on bond. Oyer was had of the bond and of the condition, which last recites that, at the then preceding term of this Court for this county, upon the petition of the said *Oliver Ruggles* and one *Charles Loveland* for a new trial, in an action wherein the said *James* was plaintiff, and the said *Oliver* and *Charles* were defendants, and in which the said *James* had recovered against the said *Oliver* and *Charles* the sum of 1230 dollars 33 cents damages, and 47 dollars 56 cents costs of suit, it was ordered by the said Court, upon the said petition, that a writ of review should issue in the said action, provided the petitioners give bond with surety to the said *James*, conditioned for the payment of the debt which the said *James* might recover on the trial of the said review, and also pay the costs taxed in the former suit; and three months were allowed for the performance of the condition of the said order of Court. "Now, therefore, if the said *Oliver* and *Charles* shall pay to the said *James* such sum as the said *James* may recover in damages and costs, in the final trial and judgment and the action of review

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which the said *Oliver* and *Charles* may prosecute against the said *James*, then the foregoing obligation shall be void; otherwise to remain in full force."

* Whereupon the defendants plead in bar, that from [* 512] the time of making the said writing obligatory hitherto, they have well and faithfully observed, performed, and fulfilled all and every thing in the said condition mentioned, on their part to be performed, observed, and fulfilled, according to the form and effect of the said condition; and this, &c.; wherefore, &c.

The plaintiff replies, (protesting that the defendants have not performed, &c.,) that the said *Oliver* and *Charles* entered their action of review, and that such proceedings were had therein that, at the September term, 1809, of this Court, he recovered judgment against the said *Oliver* and *Charles*, for the sum of 1401 dollars 8 cents damages, and 12 dollars 7 cents costs of the same suit, on which judgment execution duly issued and was delivered to a deputy sheriff, who demanded payment of the said *Oliver*, (the said *Charles* being out of the county,) who refused payment; of which refusal the said deputy sheriff notified the said *Silas*; and afterwards returned the execution unsatisfied; "which said judgment remains in full force, not reversed, annulled, *satisfied*, or in any way discharged, and which said judgment the said *Oliver* and *Silas* were, by the said bond and the condition thereof, bound to pay, satisfy, and discharge; which they and each of them have wholly failed to do and perform. Wherefore he prays judgment," &c.

To this replication the defendants demur generally, and the plaintiff joins in demurrer.

Sedgwick, in support of the demurrer, contended that no breach of the condition was set forth in the replication. The condition of the bond was that *Ruggles* and *Loveland*, the judgment debtors, should pay, &c. The breach assigned is, that *Ruggles* and *Pepoon*, the obligors, have not paid.

As to the averment, that the judgment is not *satisfied*, which is the only word that has any bearing upon the case, it is too general to take issue upon. The commitment of the judgment debtor to prison in execution is a satisfaction; *so is a [* 513] release. The condition of the bond is, that the judgment debtors shall pay. The defendants were driven to demur. (1)

It was suggested by *Sewall*, J., that the plea of *omnia performavit* was not a sufficient answer to an action of debt on bond, though it was good in an action of covenant.

(1) *Cro Eliz.* 749, *Mints vs. Bethil.* — 1 *Bos. & Pul.* 640, *Shum & Al. vs. Farring*
ton. — 2 *Burr.* 772, *Cornwallis vs. Saveru.* — 2 *Wills.* 11, *Simmons vs. Langhorn.*

Sedgwick answered, that in debt on bond for the performance of covenants, where all the matters to be performed are in the affirmative, it is sufficient to plead performance generally, leaving it to the other party to show a breach. (2) But at any rate the objection is only to the form, and is cured by being replied to. (3) To this last position *Sewall, J.*, assented.

Dewey, for the plaintiff. The plea is substantially bad. The defendants say that *they* have performed all that *they* were obliged to perform; whereas the condition was not for *their* performance of any thing, but that *Ruggles* and *Loveland* should pay, &c. As to the replication, it is sufficient in substance. It avers the judgment to be in full force, and in no way satisfied or discharged. Now, if the judgment debtors had satisfied it, these averments could not be true, and issue might have been taken upon them.

The opinion of the Court was delivered to the following effect by

SEDGWICK, J. (after stating the pleadings particularly.) It appears by this record that the bond declared on was not made in conformity to the order of the Court. The order of Court was, that the bond to be given, to entitle *Ruggles* and *Loveland* to a review, should be made to secure the payment of the judgment then in being. The bond was given to secure the payment of a judgment, which might be rendered on the review. The bond, by the oyer, has become part of the declaration; by which it appears, that, if *Ruggles* and *Loveland* should pay the judgment which might be recovered, the bond should be void. The obligors, [* 514] *Ruggles* and *Poison*, then were bound that * *Ruggles* and *Loveland* should pay; there was therefore nothing for the obligors to perform.

They plead, however, that they have performed all things on their part to be performed. This manifestly is no answer to the declaration. It is no affirmation that *Ruggles* and *Loveland* had paid; which, under the circumstances of the case, is the only sufficient answer to the declaration, which the defendants could have made.

In this view of the case, we are all of opinion, that the plea is substantially defective; and the only question is, whether the defect is cured by the replication. The pleadings on both sides are unskillful and inartificial, but neither of the counsel are responsible for this.

The replication sets forth the judgment recovered on the trial of the review; the issuing of an execution on that judgment; its delivery to an officer to collect; his ineffectual application for that

(2) Co. Lit. 303. — Cro. Eliz. 743. — 8 D. & E. 459, *Barton vs. Webb*.

(3) 1 Saund. 117, Note 1, by *Williams*.

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purpose to *Ruggles*, one of the judgment debtors and one of the defendants; that the other judgment debtor could not be found; and notice to *Pepoon*, the other defendant. All this, except the judgment on the review, was wholly immaterial, and mere surplusage.

The replication then goes on to allege, in substance, that the judgment rendered on the review still remains in full force, not annulled, reversed, satisfied, or in any manner discharged. We are all inclined to believe, that this must be considered, under a general demurrer, as containing a substantial allegation that *Ruggles* and *Loveland* had not paid the judgment; and that therefore it shows sufficiently a breach of the condition.

But this is not necessary to be determined; as it is very manifest that the replication has no tendency to cure the defects of the plea.

It is consolatory, notwithstanding the badness of the pleadings, to come to a result, by which justice is done, by compelling the defendants to perform their contract.

Replication adjudged good.

[*515]

* HENRY W. DWIGHT, Administrator, *versus* BENONI CLARK.

To a plea of *non assumpsit infra sex annos*, the plaintiff replies that, when the cause of action accrued, the defendant was out of the state, and did not return until within six years before the commencement of the action, and left no property, &c.

The defendant rejoins, that he never was an inhabitant of or resident in the state, but in *Connecticut*, where the promise was made, until he came into the state, as alleged in the replication. Upon a demurrer to the rejoinder the plaintiff had judgment.

CASE upon several promissory notes made by the defendant to *Gurdon Elsworth*, the plaintiff's intestate, dated at *Ellington*, the 4th of August, 1800, and payable on the 1st of March, 1801. The defendant pleads the statute of limitations in bar. The plaintiff replies, that, when the cause of action accrued, *viz.*, &c., the defendant was without the limits of the commonwealth, and did not return until within six years next before the commencement of this action, *viz.* until the last day of March, 1805; and that he did not leave property that could be attached by the common and ordinary process of law. The defendant rejoins, that, at the time of making the

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several promises in the declaration mentioned, he was not, nor previous to that time ever had been, an inhabitant of or resident within this commonwealth, but was, and ever had been, an inhabitant of the state of *Connecticut*, where the said promises are alleged to have been made, and that always since that time, and until the last day of March, 1805, he has resided without the limits of this commonwealth, and that since the said last day of March aforesaid, his comorancy has been at *West Stockbridge*, in the said county of *Berkshire*.

To this rejoinder the plaintiff demurs, and the defendant joins in demurrer.

Sedgwick, in support of the demurrer, contended that this action, upon the facts shown in the pleadings, would not be barred by the statute, (1) even if the fourth section had never been enacted. The statute could not attach, so as to have operation to bar a contract, the performance of which it was not in the power of the party claiming under it to enforce by law. This was the case so long as neither the debtor, nor any property of his, were within the commonwealth or the jurisdiction of the Court. Nor will it be said that, when the defendant came into the commonwealth, the statute had a retrospective effect, by referring back to the time when the right of action accrued.

[* 516] * But the replication brings the case within the provision of the fourth section of the statute, and indeed is within the very words of it. That section enacts that "If any person or persons, against whom there is, or hereafter shall be, any cause of suit, for every and any of the species of action herein before enumerated, who, at the time the same accrued, was without the limits of this commonwealth, and did not leave property or estate therein, that could, by the common and ordinary process of law, be attached, that then, and in such case, the person that is entitled to bring such suit or action, shall be at liberty to commence the same within the respective periods before limited, after such persons return into this government."

A construction against the plaintiff would be to give to foreigners a preference and exemption beyond citizens of the commonwealth. The case of *White vs. Bailey*, (2) shows that a liberal construction in favor of creditors is to be given to the exceptions contained in this fourth section of the statute.

Hulbert, for the defendant, argued that the statute of limitations were good and useful provisions of law, and on sound principles of public policy to be favored. The law presumes, if a creditor neg

(1) *Stat. 1786, c. 52.*

(2) *3 Mass. Rep. 271.*

lects to demand his debt within the time limited, that it is paid, and therefore bars any action for its recovery ; and this presumption is as strong in favor of the defendant, as if he had been the whole time an inhabitant of the commonwealth.

If the plaintiff would bring his case within the exception cited, he must be held strictly to the terms of it. But the exception applies only to those persons who have before been resident in or inhabitants of the commonwealth. The *return* into this government must intend that there had been a previous leaving of it ; and no person can be said to have *left* property or estate within the commonwealth, unless he had himself before been within it.

* *Sedgwick*, in reply. The statute raises no presumption [* 517] that the debt has been paid, unless the creditor has had an opportunity during the time to institute a suit for its recovery.

The opinion of the Court was delivered by,

SEDGWICK, J. The question in this case arises on the statute for the limitation of personal actions.

The action is on several promissory notes. The defendant pleads *non assumpsit infra sex annos*. The replication alleges, in substance, that, at the time the cause of action accrued, the defendant was without the limits of this commonwealth ; that he had left therein no property or estate that could, by the ordinary process of law, be attached ; and that he did not return into the commonwealth until six years before the commencement of the action. The rejoinder alleges, in substance, that the defendant did not " return " into the commonwealth, not having been an inhabitant thereof ; but an inhabitant of another state. To this there is a general demurrer and joinder. The question is, whether the period of limitation commenced previous to the defendant's *coming* into the state.

I do not think that the legal presumption, in relation to a statute of limitations, is, that the debt has been paid, if there be no evidence of its existence within the period of limitation ; but that the law, from considerations of public policy, had provided that such debts shall not be recoverable in courts of law ; laying out of the question any consideration whether the debt be or be not paid.

On the one hand, it is the duty of one who promises another, to fulfil his engagement, and for that purpose to resort to him ; on the other, it is not the duty of the creditor to look after his debtor.

The counsel for the plaintiff makes two points — 1. That the statute would not bar this action, if there was not the exception, within the provision of which it was intended, by the replication, to bring this case ; and, 2. That it is within that exception.

[* 518] * 1. It might not, perhaps, be unreasonable to suppose it was the intention of the statute, even without the clause relied upon, that the period of limitation should not commence until it was in the power of the plaintiff to enforce payment within this jurisdiction. But upon this point the Court give no positive opinion ; because,

2. We all think the case comes clearly within the exception. The replication states the very case, in all its parts expressed in the act to constitute an exception. The defendant was without the limits of the commonwealth, nor did he leave any property within it, that could be attached.

But it is said that by the words "leave" and "return," used in the act, it is evident that the legislature intended to confine the exception to inhabitants of the commonwealth. We all, however, think it a much more reasonable construction that the exception was intended as general, and comprehending all persons who are without the commonwealth, and have not attachable property within it, so that the statute shall not begin to run, until the defendant is, either by his person or property, subject to original process.

Rejoinder adjudged bad.

JOHN HUNT, Administrator, versus BARNABAS ADAMS

Oral testimony is not admissible to control the effect of a written contract.

THE declaration in this case, which was in *assumpsit*, contained several counts, all of which, as it appears from the report of *Sedgwick, J.*, before whom the cause was tried upon the general issue at the last May term in this county, were intended to refer only to one demand, which was founded on the following circumstances : —

Joseph Chaplin made his promissory note to the plaintiff's intestate in the words and figures following : — "*Lee*, July 23, 1804. For value received, I promised to pay *Isaac Bennett*, five hundred and fifty dollars, lawful money of the United States, on the 25th day of December, in the year of our Lord 1807, with interest ; pay to be made at *Coxsackie*. Witness my hand. *Joseph Chaplin*."

[* 519] Underneath * which, on the same piece of paper, were written the following words, subscribed by the defendant : "I acknowledge myself holden as surety for the payment of the demand of the above note Witness my hand. *Barnabas Adams*"

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At the trial, the defendant offered to prove, by oral testimony, that at the time of the contract between *Bennett* and *Chaplin*, for which the above note was given, it was agreed by them that *Chaplin* should procure the defendant to underwrite the same and other notes, given at the same time and for the same consideration, in the manner and form above expressed ; which was done accordingly ; but that it was then agreed by the parties, that the defendant was to be liable only in the event of a final loss occasioned by the inability of *Chaplin* ; and further, that that event had not occurred ; but that, on the contrary, *Chaplin* was, and ever since the making of the note had been, solvent ; and that the payment of the note might be enforced against him.

The evidence thus offered was rejected by the judge, who sat in the trial. If that rejection was right, the verdict, which was in favor of the plaintiff, was to stand, and judgment be rendered upon it ; otherwise a new trial was to be granted.

The action stood over to this term upon the foregoing report ; and now

Ashman and *Dewey*, for the defendant, contended that the evidence offered at the trial was improperly rejected.

This testimony was intended to explain the meaning of the contract, and it was necessary to a proper understanding of it by the jury. It is not known that this question has ever been decided in this commonwealth ; and unless there is some positive and explicit rule of law opposed to its admission, there exists no reason for its rejection. Juries are the legitimate judges of the effect and the weight of evidence ; and, in fact, the point in dispute in this case resolves itself into a question merely of the weight of evidence ; or, in other words, the jury ought to have an opportunity to decide whether the terms of the contract, as * reduced to [* 520] writing, or as orally agreed by the parties at the time of the transaction, shall govern.

To every contract the consent of two minds at least is necessary , and it is only on the evidence of such consent, that the law enforces the observance of a contract, or punishes the breach of it. In the present case, it is very plain that, if the evidence offered at the trial had been given to the jury, and believed by them, they would have found a contract, as understood and assented to by the parties, essentially different from that which they had before them.

By the contract, as understood by the parties, and as was offered to be proved, before the defendant was to be liable, an act was first to be done by the plaintiff. He was to apply to *Chaplin*, and to endeavor to obtain payment from him ; and if such endeavors should

finally prove fruitless, his claim upon the defendant would then come into operation, and not before. This the plaintiff has not done; and, of consequence, if the intention and understanding of the parties are to govern the contract, he has yet no demand on the defendant.

In the case of *Thresh vs. Rake*, (1) which was upon a written contract, Lord *Kenyon* admitted parole evidence that the time fixed by the contract for performance was enlarged by a posterior consent of the parties. And no reason is apparent, why parole evidence of a condition precedent, stipulated by the parties, is not equally admissible.

Sedgwick for the plaintiff.

The action being continued *nisi*, the opinion of the Court was delivered at the following March term in *Suffolk*, by

SEWALL, J. (after stating the substance of the judge's report of the trial.) The decision by this Court, in a suit between these parties, brought upon one other of the notes mentioned, (2) must be considered as settling the legal construction and operation of the note, and of the guaranty of the defendant in the writing now in question. And as to the oral testimony offered in the cause, it may be observed, that in the action heretofore decided, the defendant had been permitted to prove a verbal agreement between *Bennett* [* 521] * and *Chaplin*, to consider the defendant as holden for the payment, on the condition that *Chaplin* could not pay. And on the motion for a new trial in that cause, the admissibility of this parole evidence was thought questionable; although decision upon this point was rendered unnecessary, the plaintiff having produced evidence sufficient to charge the defendant as the surety of *Chaplin*, even adopting the defendant's construction of his guaranty, by virtue of the parole agreement between *Bennett* and *Chaplin*.

We are now, however, called to decide the question whether this parole agreement is admissible to control the construction of the defendant's written contract; for, if it is, the defendant is entitled to a new trial; and to show, if he can, the solvency of *Chaplin* when this action was commenced.

The parole agreement offered to be proved is the same, substantially, as that which had been proved at the trial in the former cause; but its position, in the order of the transaction, seems in this case to be differently stated. In this case, it preceded the making of the note in question; and in the other, it took place at the delivery of

(1) 1 *Esp. Rep.* 53.

(2) *Ante*, vol. vi. 519

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the notes to *Bennett*, the time when the contracts, in both instances, are to be considered as made with *Bennett*.

As now placed, this evidence may be objected to as irrelevant. In the motion, the previous agreement between *Bennett* and *Chaplin* is not stated to have been communicated to *Adams*, the defendant; and then it is in no sense his agreement; or, if it was communicated, there is no necessary presumption that he subscribed his guaranty with any reliance upon that stipulation, or that he did not reject it, as operating to his disadvantage. For, if a surety is to be made responsible, in a contract where the law implies no obligation of particular diligence on the part of the creditor to secure his demand against the principal debtor, a suspension of the demand upon the surety, until the entire failure and insolvency of the principal debtor, must operate injuriously upon the surety, in precluding him from every chance for an indemnity, unless this had been secured; and then the suspension is of no importance to him.

* But, without insisting upon this objection, and con- [* 522] sidering *Adams* as effectually a party to the verbal agreement proposed to be proved, we are all of opinion that evidence of this kind is inadmissible, and incompetent to control the legal effect of a written contract.

The preference, which the law gives to written evidence, when compared with parole testimony, of parole agreements, is the unavoidable result of experience. It is impossible to expect or attain that certainty and exactness in the one form of evidence, which is found in the other. When a contract has been stated in a writing assented to and signed by the parties concerned, and that continues in being, and under the control of the party relying upon it, evidence of the other parole agreements, to explain or vary the written contract, would be a rejection of that evidence, which is necessarily the best.

The cases of latent ambiguity, and of peculiar usages, are not, strictly speaking, exceptions to the general rule on this subject; for, in those cases, there is in the written contract a necessary and implied reference to extraneous circumstances, which may happen to be provable only by oral testimony; and the written contract is not controlled, but supplied or completed, according to the manifest intent of the parties.

In the case at bar, if the motion of the defendant should prevail, a conditional and collateral contract might be substituted by a parole stipulation, for a contract in writing, which is absolute, and by which the defendant engages, as a surety for *Chaplin*. The construction to be given of this note, as written, has been settled, by

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the former decision of this Court, to be the same as if the note had expressed a joint and several promise of *Chaplin* and the defendant. The defendant became responsible to *Bennett*, immediately and directly, by the legal operation of the written words which he had subscribed.

The verdict is confirmed by the opinion of the Court, and judgment is to be entered accordingly.

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SUPPLEMENT.

COMMONWEALTH OF MASSACHUSETTS.

In the House of Representatives, February 6, 1811.

ORDERED that the justices of the Supreme Judicial Court be requested, as soon as may be, to give their opinion on the following questions.

Whether aliens are ratable polls within the intent and meaning of the constitution of this commonwealth; and whether the towns in this commonwealth, in ascertaining their number of ratable polls, in order to determine the number of representatives they are entitled to send to this house, can constitutionally include in that number aliens resident in said towns, and predicate a representation on such resident aliens; and whether such representation can constitutionally be predicated on the number resulting from the including in the number of ratable polls, aliens resident in any towns within this commonwealth, and taxed, and paying taxes therein.

The polls of aliens may, within the intent of the constitution, be ratable polls, when made liable by the legislature to be rated to public taxes. — The polls of male aliens, above sixteen years of age, are now ratable polls, within the meaning of the constitution.

Ratable polls of aliens may constitutionally be included in estimating the number of ratable polls, to determine the number of representatives any town may be entitled to elect.

To the Speaker of the honorable House of Representatives of the General Court of Massachusetts.

SIR,

THE undersigned justices of the Supreme Judicial Court have considered the several questions, proposed to them by an order of the house, passed the 6th of February instant.

[* 524] * Before we advert to those questions, some general remarks on the constitution, and on some rules by which its construction is ascertained, may illustrate the reasons of our opinion.

From the manner in which the department of legislation is formed, two questions may arise — one relating to the qualifications of the electors ; and the other relating to the apportionment of senators and representatives among the senatorial districts, and among the towns.

The elector of a senator must be an inhabitant of the senatorial district in which he votes ; and the elector of a representative must have resided one year in the town, before he can there be a voter. But an alien may be an inhabitant of a district, because he may there dwell, or have his home ; and he may have resided in some town more than a year. Can, therefore, an alien be a legal voter for a senator or representative ?

Before this question is answered, we shall explain the principles on which the answer will be given.

The constitution is law, the people having been the legislators ; and the several statutes of the commonwealth, enacted pursuant to the constitution, are law, the senators and representatives being the legislators. But the provisions of the constitution, and of any statute, are the intentions of the legislature thereby manifested. These intentions are to be ascertained by a reasonable construction, resulting from the application of correct maxims, generally acknowledged and received.

Two of these maxims we will mention — That the natural import of the words of any legislative act, according to the common use of them, when applied to the subject matter of the act, is to be considered as expressing the intention of the legislature ; unless the intention, so resulting from the ordinary import of the words, be repugnant to sound, acknowledged principles of national policy. And if that intention be repugnant to such principles of national policy, then the import of the words ought to be enlarged or restrained, so that it may comport with those principles ;

[* 525] unless the intention of the legislature * be clearly and manifestly repugnant to them. For, although it is not to be presumed, that a legislature will violate principles of public policy, yet an intention of the legislature repugnant to those principles, clearly, manifestly, and constitutionally expressed, must have the force of law.

In consequence of the application of these maxims, similar expressions in different statutes, and sometimes in the same statute, are liable to, and indeed do receive different constructions, so that the true intent of the legislature may prevail.

Now, we assume, as an unquestionable principle of sound national

policy in this state, that, as the supreme power rests wholly in the citizens, so the exercise of it, or of any branch of it, ought not to be delegated by any but citizens, and only to citizens. It is therefore to be presumed that the people, in making the constitution, intended that the supreme power of legislation should not be delegated, but by citizens. And if the people intended to impart a portion of their political rights to aliens, this intention ought not to be collected from general words, which do not necessarily imply it, but from clear and manifest expressions, which are not to be misunderstood.

But the words "inhabitants" or "residents" may comprehend aliens; or they may be restrained to such inhabitants or residents who are citizens, according to the subject matter to which they are applied. The latter construction comports with the general design of the constitution. There the words "people" and "citizens" are synonymous. The people are declared to make the constitution for themselves and their posterity. And the representation in the General Court is a representation of the citizens. If, therefore, aliens could vote in the election of representatives, the representation would be not of citizens only, but of others; unless we should preposterously conclude, that a legally-authorized elector of a representative is not represented.

It may, therefore, seem superfluous to declare our opinion, that the authority given to *inhabitants* and *residents* to vote, is restrained to such inhabitants and residents as are *citizens*.

* This construction, given to the constitution, is analogous to that given to several statutes. Creditors may levy their execution on the lands of their debtors, and hold them in fee simple, unless redeemed. Although the words of the statute are general, yet they are not deemed to include alien creditors. If they were so deemed, then, under color of a judgment and execution, the rule of the common law, prohibiting an alien from holding lands against the commonwealth, would be defeated. So a general provision is made for the dower of widows; yet it is not supposed that a woman, who is an alien, can claim, and have assigned to her, dower in the lands of her deceased husband.

We now proceed to consider the constitution as relating to the apportionment of representatives among the towns, and of senators among the senatorial districts.

The right of sending representatives is corporate, vested in the town; and the right of choosing them is personal, vested in the legal voters. Because the right of sending a representative is corporate, if the town, by a legal corporate act, vote not to send a representative, none can be legally chosen by a minority dissenting from that vote. This corporate right is also a corporate duty, for

the neglect of which a fine may be assessed and levied upon all the inhabitants liable to pay public taxes.

The number of representatives, which each town may send, depends on the number of ratable polls in the town ; with the exception of towns incorporated before the making of the constitution, who may send at least one representative. The rule of apportionment, therefore, does not depend on the number of legal voters, all of whom must be of full age ; whereas the polls of minors, above the age of sixteen years, were ratable at the establishment of the constitution. What polls are or are not ratable, are not designated by the people ; they having left the designation to the discretion of future legislatures. And when the General Court has by law declared what polls are ratable, all those polls are to be deemed ratable polls in the respective towns in which they dwell.

[* 527] * A question therefore arises, whether the legislature can constitutionally provide, that the polls of aliens shall be ratable.

If, by this provision, aliens would acquire any political rights, to the diminution of the rights of citizens, we should, for the reasons before given, strongly incline to believe, that the legislature were restrained from making this provision. For, as the political rights, arising under the constitution, are manifestly the rights of the citizens, the language of the constitution ought to be so construed, if practicable, that these rights should not be diminished, by sharing them with aliens. But, without deciding what municipal, parochial, or corporate rights, aliens may, by the equity and benignity of the laws, acquire in consequence of their paying public or other taxes on their chattels, real or personal, or on their polls, it is extremely clear, that by such payment they acquire no political rights whatever. Whether their polls are or are not ratable, they are not qualified voters for senators or representatives ; nor can they be qualified to hold either of those offices.

No reasons have occurred to us, to restrain the power of the legislature from making the polls or the estates of aliens ratable ; for the only limit to that power, under the constitution, is an exercise of it repugnant to the constitution. We have observed, that the political rights of the citizens are not affected by the exercise of that power ; and we may observe, that it is the interest of the citizens, that it should be exercised, in obliging aliens to contribute their reasonable proportion towards defraying the expenses of the government. As aliens residing among us receive the protection of the commonwealth, and are secured in the fruits of their labor, and in the acquisition of goods and chattels, this contribution may be exacted, as a reasonable price of this protection and security. And when an alien is obliged to pay no other tax on his poll and

estate, than is required from a citizen, having equal personal ability and estate, he cannot complain that the assessment is inequitable.

Before we can answer directly the questions submitted to us, we are obliged to inquire, whether the polls of aliens are, *at this time*, * by law ratable. By the last public tax act, the [* 528] assessors of each town are required to assess all the male polls, above the age of sixteen years, within their respective towns, including negroes and mulattoes ; with the exception of the president of *Harvard College*, and some other descriptions of persons, in which aliens are not included. The words are general, and, according to their common usage, extend, as well to the polls of aliens, as of citizens, who are above the age of sixteen years ; and for the reasons we have given, we are not authorized so to 'restrain them, as to deny to the legislature the right of making the polls and estates of aliens ratable, or to refuse to the citizens the privilege of demanding from aliens a reasonable contribution towards the public charges.

If it should be asked, whether the poll of an alien may not be considered ratable for the purpose of obliging him to pay a public tax, and not be considered ratable for the purpose of ascertaining the political rights of the town in which he may live, we should declare that we know of but one purpose for which his poll is ratable, which is making it subject to a capitation tax. If it is so subject, it is a ratable poll within the constitution. And if any town, incorporated since the constitution was established, contained one hundred and fifty ratable polls only, including the ratable polls of aliens within it, it would be competent for the legislature to impose a fine on this town, refusing to send a representative, for the breach of such political and corporate duty.

As senators are apportioned among the senatorial districts, in proportion to the public taxes they respectively pay, we cannot distinguish between the ratable poll of an alien, operating in the apportionment of representatives among towns, and the public tax paid by an alien, operating in the apportionment of senators among the senatorial districts. And in making this last apportionment, it is not an object of inquiry, whether a part of the public tax any district has paid was assessed on and collected from the polls of aliens.

* We request the indulgence of the honorable house [* 529] for having considered the subject so much at large. Perhaps it was unnecessary ; but it was done for our own sakes, clearly to explain the reason, that while we admit the general rule, that words in any legislative act are to be construed according to the common usage, yet, that there are cases in which their import may be enlarged or restrained, to express the real intention of the legislature, which, when ascertained, is the law resulting from the act

Thus we have restrained the general import of the words "*inhabitants*" and "*residents*," used in some parts of the constitution, to inhabitants and residents who are citizens, that we might not unnecessarily fix on the people an intention of imparting any of their rights of sovereignty to aliens. And at the same time we have used the words "*ratable polls*" according to their common acceptation, as there is no principle of construction authorizing us to deviate from it, by denying to the legislature the right of making the estates and polls of aliens ratable. For the taxes, assessed on the polls and estates of aliens, have no effect on their political rights, but merely influence the apportionment of representatives among the towns, and of senators among the senatorial districts; in which apportionments aliens have no interest or concern.

We now respectfully submit to the honorable house our opinion, formed after the best deliberation we have given the subject. And it is our opinion,

That the polls of aliens may, within the true intent and meaning of the constitution, be ratable polls, when and so long as they are made liable, by any legislative act, to be rated to public taxes.

That the polls of male aliens, above the age of sixteen years, are *now* by law liable to be rated to public taxes, and *now* are ratable polls, within the intent and meaning of the constitution; and, consequently,

That the several towns in the state, in ascertaining their number of ratable polls, in order to determine the number of representatives they are entitled to send, may constitutionally include in [* 530] * the number of their ratable polls, the polls of aliens, residing in their towns respectively, by law ratable to public taxes, and predicate a representation thereon, which will be a constitutional representation.

THEOP. PARSONS,
SAMUEL SEWALL,
ISAAC PARKER.

Boston, Feb. 15, 1811.

A TABLE

OF THE PRINCIPAL MATTERS.

ABATEMENT.

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ACTION.

1. Where an attorney had a promissory note committed to him for collection, and receiving a partial payment from the debtor, paid it over to the creditor without endorsing it on the note, and afterwards obtained judgment on the note, he was held liable to the debtor for the amount of such partial payment, in an action for money had and received. *Fowler vs. Shearer.* 14

2. When money is paid in consideration of a contract, which contract is void for a want of power in one of the parties, or for any cause other than fraud or illegality in the contract, the money so paid may be recovered back in an action for money had and received. *Shearer vs. Fowler.* 31

3. An action of trespass on the case will lie against a corporation aggregate, for neglect of a corporate duty, by which the plaintiff has suffered. *Riddle vs. Proprietors of the Locks and Canals on Merrimack River.* 169

4. In an action against the proprietors of a canal, who were bound by their incorporation to construct their canal so deep and wide, that rafts of a certain description could pass through it, when the same could pass the river with which it was connected, it was held that they were liable to the owner of a raft of such description, having received toll therefor, for all the damages he sustained in consequence of the canal not being sufficient to pass the river. *Riddle vs. Proprietors of*

the Locks and Canals on Merrimack River. *Ibid.*

5. Where a statute gives a right to recover damages, reduced pursuant to the provisions of such statute, to a sum certain, an action of debt lies, if no other specific remedy is provided. *Bigelow vs. The Cambridge and Concord Turnpike Corporation.* 202

6. Where *A*, a merchant at *W*, at the request of the agent of *B*, a merchant at *X*, had given his bond at the custom-house in *W*, for the duties on certain goods consigned to *B*, and had sent them coastwise to *X*, with a certificate proper to entitle them to a drawback of duties, which certificate was withheld from *B* until he should furnish *A* with an indemnity against his bond; and that not being done, the certificate never was delivered, whereby *B* lost the drawback. — *B* was still held liable to pay *A* the amount of the duties he had paid in discharge of his bond. *Long & Al. vs. Greene & Al.* 268

7. Where one sold a vessel, and in the bill of sale described her as of certain dimensions and burden, when in truth she was of less dimensions and burden; it was held that the purchaser could not maintain an action of the case against the seller, as for a false affirmation and promise. *Dyer & Al. vs. Lewis & Al.* 281

8. *A* subscribed a memorandum of the tenor following, viz. "The subscriber hereby engages to Messrs. *B* & *C*, that if they will credit *D* a sum not exceeding 500 dollars, in case he shall not pay the same in 12 months from this date, I will pay the same myself." — In consequence whereof, *B* & *C* sold goods to *D*, to the value of 500 dollars, taking his promise

sory note for that sum. — Immediately after, *B & C* sold other goods to *D*, for which he gave them another note for 375 dollars. — Within the year, *D* paid 200 dollars, which was endorsed on the last-mentioned note; and in three months after the year expired, he paid the balance of that note, and it was cancelled. Soon afterwards *B & C* sold other goods to *D*, taking his promissory note for 379 dollars for the same, without any guaranty. — 200 dollars were paid on this last note; the balance thereof, and the whole of the note for 500 dollars, remaining unpaid. — In an action by *B & C* against *A*, upon the memorandum aforesaid, it was held that *A* was answerable for the 500 dollars, and interest from the expiration of the year; due notice having been given him, that the debt which he had guaranteed was unpaid, and the same having been demanded of him. *Sturgis & Al. vs. Robbins.* 301

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See PRACTICE, 3.

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AGREEMENT.

1. Where land had been conveyed in payment of a preëxisting debt, which was cancelled at the time of the conveyance, and it was agreed by deed that the land should be appraised, as soon as convenient, by three disinterested men, after the manner of land taken on execution; and if the appraised value of the land should be less than the debt cancelled, the grantor should pay the difference in six months from the date of the agreement. — After the expiration of the six months, the grantee nominated an appraiser; and the grantor refusing, he was held liable to an action of debt for the penalty of the agreement. *Eaton & Al. vs. Stone.* 312

2. Where an action for money had

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and received was submitted, by a rule of the Court, to referees, and in the rule the plaintiff agreed that he had no other demand on the defendant; the referees reported that the defendant still held sundry notes, the proceeds of which, when collected, would belong to the plaintiff, and gave a list of them; such agreement is no bar to a future action for the said proceeds, when collected. *Boyd vs. Davis.* 350

ALIENS.

See Ratable Polls, 1, 2, 3.

AMENDMENT.

1. In trespass *quare clausum fregit*, commenced before a justice of the peace, and carried to the Common Pleas on the defendant's pleading title in himself, the plaintiff had leave to amend his declaration, by alleging any other torts in the same close, or by giving a more accurate description of the close. *Cummings vs. Rawson.* 440

See VERDICT, 2.

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See GRANT, 1.

ASSESSORS.

1. Assessors are not liable to an action of trespass for overrating one who is liable to be taxed by them. *Little vs. Greenleaf & Al.* 336

ASSUMPSIT.

1. The law will not imply an *assumpsit*, where there is an express promise, nor against the express declaration of the party, made at the time of the supposed implied *assumpsit*. *Whiting vs. Sullivan.* 107

2. In all cases of *assumpsit*, whatever shows that a complete satisfaction has been received by the plaintiff before the trial, may be given in evidence under the general issue. *Baylies & Al. vs. Pettyplace & Al.* 326

ATTORNEY.

1. Where one conveys land as the attorney of another, he must do it in the

name of his principal, and as his act, and not in his own name or as his own act. *Fowler vs. Shearer.* 14

See ACTION, 1.

ATTACHMENT.

1. Goods which cannot be returned in the same plight, as hides in vats for tanning, are not liable to attachment. *Bond vs. Ward.* 123

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AVERAGE.

See POLICY OF INSURANCE, 3.

BAIL.

1. An administrator may surrender a principal, for whom his intestate was bail. *Wheeler vs. Wheeler.* 169

2. By the final judgment mentioned in the statute of 1784, c. 10, § 3, within one year from which *scire facias* must be served upon bail, is intended the first judgment, on which the plaintiff may sue out an execution, whether such judgment be rendered in the Common Pleas or in this Court:—and a judgment on review is not intended. *Swett & Al. vs. Sullivan.* 342

3. Bail was holden, notwithstanding the execution against the principal was made returnable at an earlier day than by law it should have been. *Ranlet vs. Warren.* 477

See SCIRE FACIAS, 1.

BANKRUPT.

1. In an action by the assignee of a bankrupt, to recover property formerly belonging to the bankrupt, the judgment of the District Court, founded upon the verdict of a jury, that the party had committed an act of bankruptcy, pursuant to the 52d section of the U. S. bankrupt law, is final upon the question as to all the creditors, as well those who shall have come in under the commission, as others. *Livermore vs. Swasey.* 213

BANKS.

See USURY, 2, 3.

BARON AND FEME.

1. A wife may bar herself of dower, by joining her husband in a deed of

conveyance, relinquishing her name to dower, and putting her seal to the deed. *Fowler vs. Shearer.* 14

2. Or she may do it by her separate deed subsequent to, and in consideration of her husband's sale. *Ibid.*

3. So she may pass her own land by deed executed by her jointly with her husband; but her covenants in such deed have no operation, but by way of estoppel. *Ibid.*

4. Her separate deed of her own land is, *ipso facto*, void, as are all the covenants contained in it. *Ibid.*

5. A release of damages by a husband for the personal abuse of his wife, is a good bar to a joint action by the husband and wife for the same cause. *Southward vs. Packard.* 95

6. Where a wife joins with her husband in the conveyance of her lands, with covenants of warranty, the lands pass by the deed, and the wife is estopped by her covenants; but she is not answerable in damages for any breach of them. *Colcord & Al. vs. Swan & Uz.*

See PRACTICE, 2.

BILL OF LADING.

1. A bill of lading is *prima facie* evidence, and of the highest nature; but it is not conclusive evidence in all cases, as to the condition of goods shipped in packages. *Barrett & Al. vs. Rogers.* 297

BILL OF SALE.

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BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. If a promissory note be given without any consideration, it is *nudum pactum*, and void as between the parties. *Fowler vs. Shearer.* 14

2. A promissory note in form, "I promise to pay," &c., and subscribed by two persons, is a joint and several note. *Hemmenway vs. Stone.* 58

3. In an action by an endorsee of a promissory note against one of two joint and several promisors, the other promisor was offered as a witness to prove the note usurious, the defendant having released him, but he was not admitted. *Jones vs. Coolidge.* 199

4. Where one wrote his name in blank, upon the back of a promissory

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note, as a guarantor of the payment, and authorized another to write a sufficient guaranty over the name; it was held to be a memorandum in writing signed by the party, within the meaning of the statute of frauds; — and parole testimony was received to prove such authority. *Ulen vs. Kittredge.* 233

5. A promissory note payable to *A* *B* or order, "on the — day of — or when he completes the building according to contract," was holden to be payable at a day certain, and negotiable. *Stevens vs. Blunt.* 240

6. Where *A* receives, in payment of a debt due him from *B*, the promissory note of *C* payable to *A*, such note is at the risk of *A*, unless there be an agreement to the contrary. *Wiseman & Al. vs. Lyman.* 286

7. An endorser of a bill of exchange is entitled to seasonable notice of its being dishonored, although he endorsed only for the accommodation of the drawer, and the drawer had no effects in the hands of the drawee. *Warder & Al. vs. Tucker.* 449

8. Where the payee of a promissory note, payable to order, had endorsed thereon, "I guaranty the payment of the within note in eighteen months, if it cannot be collected of the promisor before that time;" the holder, to recover against such endorser, must prove a title to the note in himself. *Tyler vs. Binney.* 479

9. Where a promissory note was payable on the 4th, a demand made on the 10th of the month was held to be within a reasonable time to charge the endorser, the holder of the note living near 200 miles from the promisor's place of abode: — but a demand on the promisor, and notice to the endorser, on the 3d of the succeeding month, were held not to be within a reasonable time. *Freeman & Al. vs. Boynton.* 483

10. Any credit, given by the endorsee and holder of a promissory note to the promisor or endorser, is a consent to hold the demand on the sole responsibility of such promisor or endorser. *Shaw vs. Griffith.* 493

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1. The breaking and entering of a dwelling-house, with intent to cut off an ear of an inhabitant, is not a felony. *Commonwealth vs. Newell & Al.* 245

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COLLECTOR OF TAXES.

1. A collector of taxes is competent to collect taxes granted and agreed on before his appointment. *Colburn vs. Ellis & Al.* 89

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COPARTNERS.

1. A demand of copartners in trade belongs to the survivor to collect, notwithstanding an adjustment of all the concerns of the copartnership between him and the administrator of the deceased copartner, in which it was agreed that the proceeds of such demand should be equally divided between them. *Peters. Admr., vs. Davis.* 257

CORONER.

See SHERIFF, 12.

CORPORATION.

1. Where a corporation was created by law, "for making, laying, and maintaining side-booms in convenient places in — river," &c. it was held that they were not authorized by their incorporation to enter the close of another, adjoining the river, without the owner's consent. *Perry vs. Wilson.* 393

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COSTS.

1. The Court, on a motion for a new trial, do not inquire into the consequence of a verdict, as it may affect the costs of the suit. *Hagar vs. Weston.* 110

2. Of costs to be taxed, when an action is referred. *Hayward vs. Ritchie & Al.* 286

3. In an action commenced in the Common Pleas against a sheriff for the neglect of his deputy, the plaintiff recovered fifty cents damage, and taxed his costs at seventy-four dollars, fourteen cents. Upon error brought, the Court reduced the costs to twelve and a half cents. *Waite vs. Garland.* 453

4. The provision of the statute of 1807, c. 122, § 2, limiting costs to one quarter of the damages recovered in actions commenced in the Common Pleas, where those damages are less than twenty dollars, does not extend to judgments rendered on the report of referees. *Moore vs. Heald.* 467

5. Nor to actions of trespass *quare clausum fregit.* *Dummer vs. Foster.* 476

6. Where a plaintiff in review becomes nonsuit, because no review lay in the case, the defendant shall have his costs. *Treat vs. Hathaway & Al.* 503

7. Costs may be given upon a petition for partition, where an issue in law only is joined. *Sweet & Al. vs. Bussey. Ibid.*

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COUNTY.

1. An action against the inhabitants of a county cannot be sued in the Court of Common Pleas for such county. *Hawkes vs. Inhabitants of the County of Kennebeck.* 461

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DAMAGES.

1. Where, after a default, damages are assessed for the plaintiff, either by the judge or the jury, and the judge admits illegal evidence, the party aggrieved may file exceptions to such admission, and thus bring the question before the whole Court. *Storer vs. White.* 448

DEBENTURES.

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DEBT.

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DEED.

1. There may be implied covenants or covenants in law, in a deed containing express covenants; but such implied covenants must be consistent with those which are expressed. *Gates vs. Caldwell & Al. Exrs.* 68

2. A conveys land, for a valuable consideration, to B, C, and D, selectmen of the town of H, to them and their successors in the said trust of selectmen for the time being, for the use of E, and after his death, if any of the premises should remain, then to E's heirs forever; to hold for the use aforesaid, at the discretion of the grantees: E, being in possession of the premises, before and after the conveyance, until his death, and having devised the same to his wife in fee: it was held that B, C, and D, took a legal estate in trust for E, and his heirs; that, as the legal estate was in trust, it must be commensurate with the trust, and therefore was an estate in fee simple; and that E had an equitable fee simple, which he might lawfully devise. *Newhall vs. Wheeler.* 189

3. Of the effect of a deed of conveyance of the land conveyed. *Knox & Al. vs. Jenks.* 488

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DEVISE.

1. Where a devisee dies before the testator, leaving no lineal descendants, the devise lapses: if he leave such descendants, they take as purchasers. *Fisher vs. Hill.* 86

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DOWER.

1. The judge of probate has no authority to assign the reversion of the widow's dower to one of the heirs, in exclusion of the rest; and a decree to that effect of forty years' standing was held to be void, and the land yet subject to partition among the heirs. *Sumner vs. Parker.* 79

2. A jointure, whether made before or after marriage, was no bar to dower at common law; and no jointure is now a bar, within the statute of 27 H. 8, c. 10, (which has always been in force here,) unless it be a freehold estate in lands for the life of the wife, to take effect immediately after the husband's death. Therefore where, by a marriage settlement, the husband covenanted that the wife should have an annuity out of his estate, in consideration whereof she covenanted not to demand dower in his estate: it was held that she was still entitled to her dower. *Hastings vs. Dickinson & Uz.* 153

3. An actual corporeal seizin, or a right to such a seizin, in the husband during the coverture, is necessary to entitle the widow to her dower: a legal seizin of a vested remainder is not sufficient. *Eldridge & Al. vs. Forestal & Uz.* 253

See BARON AND FEME, 1, 2.

EMBARGO.

1. The laws of the U. States, laying an embargo for a limited time, and afterwards repealed, did not extinguish a promise to deliver debentures, but operated a suspension only during the continuance of those laws. *Baylies & Al. vs. Fettyplace & Al.* 325

2. Where one hired a vessel for a voyage, and by the charter party had contracted to pay a certain sum per month for the hire during the voyage, it was held that the hire was payable while the vessel was detained in port by an embargo laid by the government of the United States. *Minot, Admr., vs. Durant.* 436

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EQUITY OF REDEMPTION.

1. The purchaser of an equity of redemption, sold by the sheriff on execution, pursuant to the statute of 1786, a.

70, obtains by such sale a legal seizin of the land, and may maintain a real action against any stranger, unless such stranger had in fact disseized the mortgagor before the sale of the equity. *Wellington vs. Gale.* 138

ERROR.

1. A judgment of the Common Pleas will not be reversed on error, because the items of the bill of costs do not appear. *Southworth vs. Packard.* 95

2. Error does not lie upon a judgment rendered on a case stated and submitted by the parties to the opinion of the Court. *Alfred vs. Saco.* 380

3. Papers filed in a case, and used as evidence in ascertaining the plaintiff's damages after a default, are no part of the record, nor can the Court take notice of them upon a writ of error brought to reverse a judgment for such damages. *Storer vs. White.* 448

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1. In debt against the gaoler for an escape of one committed on execution, the plaintiff is entitled to recover the whole sum for which the prisoner was held. *Porter vs. Sayward.* 377

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1. Evidence of a promise to deliver debentures, will not support an action upon a promise to pay money. *Baylies & Al. vs. Fettyplace & Al.* 325

2. Where one has pleaded the general issue to a writ of entry, it is not competent to him to prove himself tenant at will of the land demanded. *Pray vs. Peirce.* 381

3. In trespass *quare clausum fregit* before a justice of the peace, the defendant cannot give evidence of a right of way under the general issue. *Stroud & Al. vs. Berry.* 385

4. Where a corporation, created for pious and charitable uses, were made the residuary legatees in a will, its members were received as witnesses, on the question of the sanity of the testator, which was at issue between the executors and the heir at law. *Nason vs. Thatcher & Al., Exrs.* 398

5. The payee of a promissory note, who had endorsed it with a saving of his own liability, was received as a competent witness to prove an alteration of the note after its execution. *Parker vs. Hanson.* 470

6. Oral testimony is not admissible to control the effect of a written contract. *Hunt, Admr., vs. Adams.* 510

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EXECUTION.

1. Where justices of the peace happen to be appraisers of lands, upon which execution is about to be extended, they may administer the oath to each other. *Barnard vs. Fisher.* 71

2. Or the oath may be administered by the judgment debtor, if he be a justice of the peace. *Ibid.*

3. In the levying of an execution upon several tracts of land belonging to the same judgment debtor, it is not necessary to make a several appraisement of each. *Ibid.*

4. Where appraisers of land levied upon, deducted from its actual value the supposed amount of an encumbrance from a previous attachment at the suit of another creditor, in which judgment was not rendered, their proceedings were held to be irregular and void. *Ibid.*

5. Where such a prior attachment exists, the second attaching creditor should delay his proceedings in court, until the suit, on which the former attachment was made, be determined. *Ibid.*

6. The provincial act of 6 Geo. 2, c. 2, respecting an officer's setting off cross executions against each other, is not repealed by the revised statute of 1783, c. 57, concerning the issuing and serving of executions. *Goodenow vs. Buttrick.* 140

7. An officer, having an execution in favor of *A* against *B* and *C*, and another in favor of *B* against *A*, ought, if

B consent, to set off one execution against the other. *Ibid.*

8. But where a coroner had an execution in favor of *A B* against a deputy sheriff and another, and that other had an execution against *A B*, directed to the sheriff or his deputy, which he offered to the coroner, and requested him to set off one against the other; it was held that this was not a case within the act of 6 Geo. 2, and that the coroner, being a stranger to the precept last mentioned, was not obliged to receive it, nor to return it in any part satisfied. *Ibid.*

9. Where *A* obtains a judgment against *B* and *C*, and at the same term *B* recovers a judgment for a larger sum against *A*; if *B* will acknowledge satisfaction of the amount of *A's* judgment against *C* and himself, in part of his judgment against *A*, the court will stay *A's* execution, and give *B* and *C* their execution for the balance. *Ibid.*

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EXECUTORS AND ADMINISTRATORS.

1. By the provincial laws in force prior to the statute of 1783, c. 32, which authorized the courts of law to license executors and administrators to sell the real estates of persons deceased for the payment of debts, &c., no certificate from the probate court of the necessity of such sale was required, but the same might be made to appear in any other way. Therefore, where an insufficient certificate had been made in such a case 27 years before, and in consequence thereof a sale had been licensed by the Court of Common Pleas, the administrator in the subsequent proceedings having conformed to the requirements of the law, the heir at law of the deceased, in an action against the purchaser for the recovery of the land sold under such license, was not permitted to give evidence that the personal estate of the deceased was sufficient for the payment of all his just debts. *Leverett vs. Harris.* 202

2. An action against a sheriff for the

default of his deputy in not returning an execution survives to the administrator of the judgment creditor. *Paine vs. Ulmer.* 317

3. Heirs at law, creditors, and others interested in an estate sold by executors, &c., under a license from a court, are not concluded by such sale, unless every essential requisite and direction of law respecting the same has been complied with; except after long acquiescence. But strangers, having no privity of estate, or interest affected by such sale, cannot question the proceedings of an executor, &c., otherwise duly authorized, and whose deed, made or recited to be made, upon a sale pursuant to such authority, is produced. *Knox & Al. vs. Jenks.* 488

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FOREIGN ATTACHMENT, 6.

FACTOR.

1. A commission merchant in *Boston* sold goods consigned to him on three months' credit, taking in payment the purchaser's promissory note payable to himself or order: the purchaser became bankrupt before the time of payment arrived, and no dividend was ever declared of his estate. It was held that the factor was not answerable to his principal for the value of the goods sold. *Goodenow vs. Tyler.* 36

2. A sale by a factor creates a contract between the owner and the buyer; and, if on credit, the buyer may not pay the factor after notice from the owner; except where the factor sells in his own name, and is responsible to the owner for the price, whether collected or not; or where he sells to his own creditor, there being mutual dealings between them. *Kelley vs. Munson.* 319

FEES.

See SHERIFF, 1.

FELONY.

See BURGLARY, 1.

FIXTURES.

1. Iron stoves, fixed to the brick-work of the chimneys of a house, are a part of the house, and pass with it on the extent of an execution upon it. *Godard vs. Chase.* 432

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FOREIGN ATTACHMENT.

1. One summoned as a trustee of an absconding debtor cannot appear and plead for his principal, unless he has effects in his hands, on which the process may take effect. *Blake vs. Jones & Trustee.* 28

2. Nor can he plead in his own name except when he is personally injured by the process, as when he is the only person summoned as trustee, and is called to answer out of his county. *Ibid.*

3. But a trustee having effects may, in the name of his principal, take any legal exception in abatement, as the want of a regular service on the principal. *Ibid.*

4. Where *A* and *B* were summoned as the trustees of *C*, and, pending the suit, *C* recovered a judgment against them, which they reviewed, giving bonds, &c., and, pending the review, *A* and *B* settled the action with *C*, by paying him the amount of the first judgment, with double interests and costs, they were charged as trustees, notwithstanding such payment. *Locke vs. Tippets & Trustees.* 149

5. A public officer, who has money in his hands to satisfy a demand which one has upon him merely as such public officer, cannot for that cause be adjudged his trustee. *Chealy & Al. vs. Brewer & Trustee.* 259

6. An executor cannot be charged as the trustee of one to whom a pecuniary legacy is bequeathed by the will of the testator. *Barnes vs. Treat & Trustee.* 271

7. Where one had delivered to his sureties certain negotiable promissory notes, for their indemnity against their liabilities on his account, and it was afterwards ascertained that the same were not necessary to their indemnity, no demand of them having been made by the bailor, it was held that the bailees were not chargeable as his trustees or account of their holding those notes. *Maine Fire and Marine Insurance Company vs. Weeks & Trustees.* 438

See MORTGAGE, 1.

FOREIGN SENTENCE.

See TRIAL, 1.

GAOL.

1. Though a bond for the liberty of the gaol-yard be taken for less than double the sum for which the prisoner is committed, and so is not within the statute, it is still a good bond at common law; but the debtor may be relieved against the penalty by a judgment for the sum for which the prisoner is committed. *Clap, Admr., vs. Cofran.* 98

Freeman vs. Davis & Al. 200

2. Notwithstanding such bond, the sheriff may be charged with an escape. *Ibid.*

3. Where no records of the Sessions could be found, appropriating apartments in the gaol to the use of debtors, but evidence was of such appropriation by long usage of lodging-rooms for debtors, it was held an escape in a prisoner having the liberty of the yard to be out of those rooms in the night time. *Ibid.*

4. Where a prisoner in execution for debt, having given bond for the liberty of the yard, was in the night time in a room upon the ground floor of a house owned by the county, within the limits of the yard, and kept by the gaoler, the chambers only of which above the ground floor had been used by debtors having the liberty of the yard, he was held to have committed an escape. *Freeman vs. Davis & Al.* 200

See ESCAPE, 1.

GAOL-YARD.

See GAOL, 2, 3, 4.

GRANT.

1. By a grant of a grist-mill *with the appurtenances thereon*, the soil of a way, immemorially used for the purpose of access to the mill from the highway, does not pass. *Leonard vs. White.* 6

See DEED.

GUARDIAN.

See MARRIAGE AND DIVORCE, 7.

HEIR.

1. A contract made by an heir to convey, on the death of the ancestor, living the heir, a certain undivided part of what should come to the heir by descent, distribution, or devise, is a fraud upon the

ancestor, productive of public mischief, and void as well at law as in equity. *Boynton vs. Hubbard.* 112

See EXECUTORS, &c. 1, 3.

HIGHWAYS.

1. The duty of repairing highways is enjoined on towns wholly by statute; and an indictment against a town for neglect of this duty must allege the offence *contra formam statuti*, or it will be quashed. *Commonwealth vs. Springfield.* 9

2. It is discretionary with the Sessions to appoint a viewing committee, on an application for a highway, or not; and such committee may be appointed before notice to the towns, &c. They need not be sworn; and they may view at the expense of the applicants for the way. *Commonwealth vs. Cambridge.* 158

3. When certain persons had been admitted to oppose the location of a way, and after a continuance, the petitioners moving for further proceedings, prior to which the court had ordered that all the respondents should be notified, and further proceedings were had without notice to those who had been so admitted, the proceedings were held to be irregular. *Ibid.*

4. The phrase "*from place to place*," in the statute of 1786, c. 67, § 4, means from one place in a town to another place in the same town. *Ibid.*

5. Upon an application for an alteration of an existing way, the Sessions cannot lay out a new one. *Ibid.*

6. An indictment lies for a nuisance on a town way. *Commonwealth vs. Gowen.* 378

7. In an indictment for a nuisance on a public way, it is not necessary to allege the continuance of such nuisance to be with force and arms. *Ibid.*

HOUSE OF CORRECTION

1. Where one who had been committed to the house of correction, as being a person dangerous to be permitted to go at large, was brought thence by order of court, and tried and acquitted on an indictment for murder, he was remanded by the court to the place from whence he had been brought. *Commonwealth vs. Meriam.* 166

INDICTMENT.

See BURLARY, 1.
HIGHWAYS, 1, 6, 7.
ROBBERY, 1.

INFORMATION.

See PLEADING, 6.

INSOLVENT ESTATES.

See SHERIFF, 7.

JOINDER IN ACTION.

1. Tenants in common, and heirs by our statute of distributions, must join in actions for the destruction of their charters or title deeds. *Daniels & Al. vs. Daniels & Al.* 135

JOINT TENANTS.

See MORTGAGE, 2.

JOINTURE.

See DOWER, 2.

JUSTICES OF THE PEACE.

1. A justice of the peace has no authority to take a recognizance, from one charged as a receiver of stolen goods, to the party from whom the goods were stolen, to secure to him the payment of the treble damages given by statute of 1784, c. 66. *Vose vs. Deane & Al.* 280

LAPSED DEVISE.

See DEVISE, 1.

LETTER OF LICENSE.

1. Where one had made a promissory note payable on demand, and the promisee afterwards executed a letter of license to him, in which he covenanted to receive payment in five equal instalments, and, that if he sued the promisor, contrary to the tenor and effect of such license, he should be discharged of all demands. The three first instalments were duly paid; and the fourth not being paid, the promisee brought his action upon the note before the fifth was payable. It was held that the action lay, and that the plaintiff was entitled to recover the whole balance due by the note. *Upham & Al. vs. Smith.* 265

LIBEL.

See MARRIAGE AND DIVORCE, 6, 7, 8, 10.
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LIMITATION.

See PLEADING, 8.

MARRIAGE AND DIVORCE.

1. It is a substantial compliance with the statute for regulating marriages, for the parties themselves to make the mutual agreements in the presence of a justice of the peace, or a minister, with his assent, he undertaking to act on the occasion in his official capacity. *Milford vs. Worcester.* 48

2. But if the justice or minister does not consent to act in his official character, the marriage is void: the woman cannot claim her dower, nor the issue their seizin by descent. *Ibid.*

3. The same law is of a marriage contracted by the parties themselves before any witnesses whatever, unless a minister or justice be present, consenting to act in his official character. *Ibid.*

4. A marriage solemnized by a minister or justice, between parties who may lawfully marry, although without publication of the bans, or the consent of parents or guardians, is valid, although the officer incurs a penalty for a breach of his duty. *Ibid.*

5. A record of a marriage solemnized by a minister or justice, founded on a certificate duly made, is legal evidence of the marriage; and no inquiry is made as to the publication of the bans, the consent of parents or guardians, or the inhabitaney of the parties. *Ibid.*

6. Where a libellant for a divorce stated her original name to have been *Launders*, and in the copy published to give notice to the other party, the name was spelled *Saunders*, the notice was held insufficient. *Jenne vs. Jenne.* 94

7. A libel for a divorce cannot be sued by a guardian of a spendthrift. *Winslow vs. Winslow.* 95

8. Where the respondent in a libel for a divorce is merely absent on a voyage, with an expectation of returning, the court will not proceed upon a notice in a newspaper. *Mace vs. Mace.* 212

9. Upon the suggestion of the counsel for the respondent in a libel for a divorce, that she was insane, the court permitted the counsel to plead to the libel in the name of the respondent. *Broadstreet vs. Broadstreet.* 474

10. Where a copy of a libel and

summons had been left by an officer at the last and usual place of abode of the party libelled, but it appeared that she was not then nor afterwards, before the sitting of the court, within the county, the court would not hear the cause, until personal notice given. *Randall vs. Randall.* 502

MARRIAGE SETTLEMENT.

See DOWER, 2.

MINOR.

1. At common law a father may assign the services of his minor son to another, for a consideration to enure wholly to the father; and this for a longer or shorter term, limited, however, by the son's minority, and the life of the father. *Day vs. Everett.* 145

2. And the statute of 1794, c. 64, does not take this power from the father; all contracts of service, legal at the common law, remaining legal since the statute; but the only remedy, which either party can have, is upon the contract, and not under the statute, unless the binding pursue the statute. *Ibid.*

3. When minors are bound apprentices pursuant to the statute, all considerations must be secured to the apprentice, whether such binding be by parents or guardians, or by the minor with the approbation of the selectmen. *Ibid.*

See SETTLEMENT, 5.
PLEADING, 4.

MORTGAGE.

1. A mortgagor, being sued as the trustee of the mortgagee, was committed in execution as such trustee, and was discharged from prison by taking the poor debtor's oath; and he was afterwards released by the creditor in the foreign attachment. It was held that the mortgagee was entitled to judgment for possession, notwithstanding the above facts. *Cary vs. Prentiss.* 63

2. Where land is conveyed to two in mortgage as collateral security for a joint debt, it is holden in joint tenancy, notwithstanding the statute of 1785, c. 62. *Appleton vs. Boyd.* 131

3. Where a mortgagor assigns the land mortgaged to two or more tenants, to hold in common, if they resist the entry of the mortgagee, or drive him to

his action to foreclose, each assignee is to be considered as a deforciant of the whole. *Taylor & Al. vs. Porter.* 355

4. If two distinct closes are included in a mortgage, and the mortgagor conveys the closes in fee to different persons, by whom they are held in severality, the mortgagee must have two several writs of entry to foreclose the mortgage. *Ibid.*

5. But in such case the mortgages shall have judgment on each writ, unless the whole mortgage money be paid. *Ibid.*

6. If either grantee pay the whole money, the mortgage is discharged as to the others, who shall be holden to a reasonable contribution to him who so pays. *Ibid.*

MULATTO.

1. A mulatto is a person begotten between a white and a black. *Medway vs. Natick.* 88

2. The issue of such a person and a white is not a mulatto. *Ibid.*

NEW TRIAL.

1. When the evidence at the trial differs from the declaration, in a part not constituting the gist of the action, the court will not send the cause to a new trial. *Cunningham vs. Kimball.* 65

2. A want of recollection of a fact, which by due attention might have been remembered, is not a ground for granting a new trial. *Bond vs. Cutler.* 205

See COSTS, 1.

VERDICT, 1, 3.

OUSTER.

1. A trespass on the land of another will not amount to an ouster, without a knowledge thereof by an owner, either express or implied. *Pray vs. Peirce.* 381

PARISH.

1. Where one was, with his poll and estate, by a private statute set off from the town of *A*, to a parish in *B*, forever thereafter to be considered as belonging to the said parish, there to do duty and enjoy parish privileges, it was held that a person afterwards living on the same estate was a member of the parish in *B* and eligible as an assessor

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thereof; although as to municipal rights and duties he continued an inhabitant of *A. Colburn vs. Ellis & Al.* 89

2. A poll parish is within the statute of 1786, c. 10, § 5, which provides that the remaining part of a town, from which a parish is taken, shall constitute the first parish. *Minot vs. Curtis & Al.* 441

3. A parish may be known by several names. *Ibid.*

4. A minister of a town or parish, seized of lands in right of the town or parish as parsonage lands, &c., is for that purpose a sole corporation, and holds the same to him and his successors. *First Parish in Brunswick vs. Dunning & Al.* 445

5. In case of a vacancy of the office of minister, the town or parish is entitled to the custody of the lands, and may enter and take the profits, until there be a successor. *Ibid.*

6. Every town is considered to be a parish, until a separate parish be formed, when the inhabitants and territory not included in the separate parish form the first parish, and the minister of such first parish by law holds, to him and his successors, all the estates and rights, which he held as minister of the town before the separation. *Ibid.*

PARSONAGE.

See PARISH, 4, 5.

PARTITION.

1. A petition for partition lies only for one who has a seizin in fact of the premises. *Bonner & Al. vs. Proprietors of the Kennebeck Purchase.* 475

2. Where lands lying on each side of a river was owned by the tenants in common, who made partition of the same by assigning the land on one side of the river to one, and that on the other side to another, it was held that the two tracts were to be considered as separate by the thread or central line of the river. *King vs. King.* 496

3. A petition for partition does not lie where the applicants hold the whole of the land of which partition is prayed. *Swett & Al. vs. Bussey & Al.* 503

See COSTS, 7.

DOWER, 1.

SEIZIN, 1.

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PILOT.

1. The penalty imposed by the statute of 1796, c. 85, § 3, does not extend to one who pilots a public vessel of war of the *United States.* *Ayers vs. Knox.* 306

PLEADING.

1. To a writ of *entry sur disseisin*, in which the demandants counted on the seizin of their father, and on an abatement on his death by a stranger, the tenant pleads a release from the demandants to him, pending the suit, of all their right. The demandants reply, that they had bargained and sold the demanded premises to one *W. D.* and his heirs, they and the said *W. D.*, believing that they had good right to convey the same, and that this action is sued for his use and benefit; of all which they allege the tenant to be well knowing before the execution of the release to him. Upon demurrer, the replication was held bad. *Everenden & Al. vs. Beaumont.* 76

2. In trespass for taking chattels, the defendant justifies as an officer under a writ of replevin. It is sufficient to allege in such plea, that the plaintiff in replevin gave bond, &c., before the chattels were delivered to him. *Cushman vs. Churchill.* 97

3. Where an original writ bears test of a justice of the Common Pleas, who is plaintiff in the suit, if the defendant would avail himself of it, he must plead it in abatement. *Prescott vs. Tufts.* 209

4. To an action by an infant plaintiff, who sued by *A B*, his next friend, the defendant pleaded in abatement, that the plaintiff's mother was living, and that the action ought to have been prosecuted by her as guardian by nature, &c. The plea was held ill, it not being matter in abatement, but if material. it was ground for a motion to stay proceedings. *Trask vs. Stone.* 241

5. Whether, in any case, the party who tenders an immaterial issue, which is found against him, can have a reprieve awarded on his own motion: *Quere. Eaton & Al. vs. Stone.* 312

6. To an information for an intrusion into the lands of the commonwealth, the defendants pleaded a former judgment of this Court in their favor, on an information in behalf of the commonwealth

against them concerning the same lands, rendered on a report of referees, which report contained a stipulation that the defendants should within six months execute a release to the commonwealth of certain other lands; and that the judgment was entered agreeable to the report. Replication that the six months are elapsed, and that the defendants did not within the six months execute the release; — and held good. *Commonwealth vs. Pejepscut Proprietors.* 399

7. In an action of covenant of warranty of lands, brought by one who has assigned his interest in the lands to another, the declaration must show that the plaintiff is answerable to his assignee. *Niles vs. Sawtell.* 444

8. To an action of debt on a review bond, the condition of which was that the judgment debtors should pay such sum as the judgment creditors might recover on the review, the defendants, after oyer of the bond and condition, plead in bar, that they have performed all things on their part to be performed. The plaintiff replies that the judgment on the review was wholly unsatisfied. The Court held the plea in bar bad, and the plaintiff had judgment. *Fredland vs. Ruggles & Al.* 511

9. To a plea of *non assumpsit infra sex annos*, the plaintiff replies, that when the cause of action accrued, the defendant was out of the state, and did not return until within six years before the commencement of the action, and that he left no property, &c. The defendant rejoins that he never was an inhabitant of, or resident within, the state, but in the state of *Connecticut*, where the promise was made, until he came into the state, alleged in the plaintiff's replication. Upon demurrer to the rejoinder, the plaintiff had judgment. *Dwight, Admr., vs. Clark.* 515

See AMENDMENT, 1.

MARRIAGE AND DIVORCE, 9.
RECOGNIZANCE, 1.

POLICY OF INSURANCE.

1. A cargo was insured from *Boston* to *Rotterdam* and *Amsterdam*. On the outward passage, the master received notice of the *British* orders in council, declaring the ports of *France*, *Holland*, &c., in a state of blockade; and in consequence thereof proceeded to *Ply-*

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outh, in *England*, for the purpose of procuring intelligence. While at this latter port, he was informed of the *French* decrees, which declared all vessels, &c., good prize, which had been at a *British* port. By the laws of *England* at that time, he could not clear for a port in *Holland*, without leaving a part of his cargo. Upon this he went to *London*, where the cargo was discharged for the benefit of all concerned. As soon as the assured heard that the cargo was unloading in *London*, they abandoned it to the underwriters, on the ground of a total loss of the voyage. It was held that the going to *Plymouth* was no deviation; — that the prohibition there to export a part of the cargo was not an arrest or detainment by princes, &c.; that the going from *Plymouth* to *London* was a deviation: and that the underwriters were not liable as for a loss of the voyage. *Lee & Al. vs. Gray.* 349

2. A ship was insured from the *United States* to *Cork* or *Liverpool*, either or both. After passing *Cork*, contrary to the intentions of the master, so far that it was impracticable to reach it in the then state of the wind and weather, although it was practicable to go to *Liverpool*, the master bore away for *Dublin* to gain information of the state of the markets; and in the course thither a loss was incurred. It was held that this was no deviation, and that the underwriters were liable for the loss. *Clark vs. United Fire & Marine Insurance Company of Portland.* 365

3. Of the adjustment of a general average upon a valued policy. *Ibid.*

POOR.

See SETTLEMENT

PRACTICE.

1. Where a verdict is found for the plaintiff on some counts, and for the defendant on others, the plaintiff is entitled to costs as the prevailing party. *Fowler vs. Shearer.* 14

2. In trespass *quare clausum fregit* by husband and wife, for a trespass on the lands of the wife, after a verdict for the defendant, and before judgment, the wife died, and the defendant had judgment for his costs against the husband. *Fowler & Uz. vs. Shearer.* 31

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3. In a popular action to recover a forfeiture for taking excessive usury the plaintiff had leave to amend his declaration on payment of costs; it appearing that he was barred by the statute of limitations from commencing another action for the same cause. *Davis, Qui tam, vs. Saunders.* 62

4. The Court would not stay execution upon a petition for a review, where the petitioner had failed to serve the first order of notice; and before a second would be returnable, the year would expire, within which execution might issue. *Nichols vs. Foster.* 63

5. The court will not hear a cause referred to them upon an agreed statement of facts, by which only a preliminary question will be settled, leaving the merits undecided. *Austin vs. Wilson & Al.* 205

6. Depositions taken in term time, the Court not being actually in session and the opposite party having notice, are received, though taken without an order of Court. *Jones vs. Spring & Al.* 251

7. When an action is delayed for the convenience of the Court, they will take care that no party suffers by such delay: therefore, where, after a continuance of an action by order of court for advisement, the defendant in the action died, judgment was entered as of the former term. *Perry vs. Wilson.* 393

See COSTS.

REVIEW.

VERDICT.

DAMAGES.

PRISON.

See GAOL.

PROCHEIN AMI.

See PLEADING, 4.

PROMISE.

1. Where one, through a mistake of the law, acknowledges himself under an obligation, which the law will not impose upon him, he shall not be bound thereby. *Warder & Al. vs. Tucker.* 449
Freeman & Al. vs. Boynton. 483

PUBLIC TEACHER.

1. One claiming ministerial taxes must be the public teacher of one society, and that society must be an incor-

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porated one. *Turner vs. The Second Precinct in Brookfield.* 60

2. When one would have his ministerial taxes paid over to his own teacher, he must notify the parish of his election, and his teacher must demand the money within a year after the taxes are assessed. *Lovell vs. The Parish of Byfield.* 230

3. Such teacher must be the teacher of an incorporated society. *Ibid*

RATABLE POLLS.

1. The polls of aliens may, within the intent of the constitution, be ratable polls, when made liable by the legislature to be rated to public taxes. 523

2. The polls of male aliens, above sixteen years of age, are now ratable polls within the meaning of the constitution. *Ibid.*

3. Ratable polls of aliens may constitutionally be included in estimating the number of ratable polls, to determine the number of representatives any town may be entitled to elect. *Ibid.*

RECEIVER OF STOLEN GOODS.

See JUSTICES OF THE PEACE, 1.

RECOGNIZANCE.

1. In an action of debt on a recognizance taken by a justice of the peace, conditioned to prosecute an appeal from his judgment to the Common Pleas, it must be alleged that the recognizance was returned to, and made a record of that court. *Bridge vs. Ford.* 209

2. A justice of the peace, taking a recognizance for appearance, must return the recognizance to the court, where the recognizor is to appear; — and if such court has not power to award execution upon a *scire facias*, it must certify the recognizance to some court, where such execution can be awarded. *Johnson vs. Randall.* 340

3. A justice of the peace can bind the putative father of a bastard child to answer only by taking a bond, and not by recognizance. *Ibid.*
Merrill vs. Prince. 396

REFEREES.

See AGREEMENT, 2.

RELEASE.

1. A release of damages by a husband, for the personal abuse of his wife, is a good bar to the joint action by the husband and wife for the same cause. *Southworth vs. Packard.* 95

2. A release to one not in possession, if made for a valuable consideration, will be construed to be any lawful conveyance, by which the estate might pass. *Pray vs. Peirce.* 381

See PLEADING, 1.

REPLEVIN.

1. The action of replevin is local in its nature, and must be brought in the county where the goods and chattels are taken, or distrained. *Robinson vs. Mead.* 353

2. Defendants in replevin cannot stay execution by giving bond to review. *Luckfort vs. Keen.* 500

See PLEADING, 2.

REVERSION.

See DOWER, 1.

REVIEW.

1. Reviews are only had in actions commenced by writ. *Borden vs. Borden.* 93

2. The affidavit of a petitioner for a review may be used on the hearing of the petition, to prove facts known only to himself. *Coffin vs. Abbot.* 252

3. Depositions of other persons are not received on such hearing, unless taken with the usual forms, as depositions to be used in the trial of a cause. *Ibid.*

4. Slight evidence is sufficient to sustain such a petition, where the petitioner has had no trial. *Ibid.*

See BAIL, 2.

COSTS, 6.

FOREIGN ATTACHMENT, 4.

REPLEVIN, 2.

RIVER.

See PARTITION, 2.

ROBBERY.

1. A larceny, committed with actual force and violence, or with constructive force, by any assault and putting in

fear, is a robbery; and in an indictment for such offence, an allegation of force and violence is sufficient, without alleging that the party robbed was put in fear. *Commonwealth vs. Humphries.* 242

SCIRE FACIAS.

1. An execution delivered to the sheriff who served the original writ, and a return of *non est inventus* by him, is sufficient to maintain a *scire facias* against the bail, although the principal live in another county. *Brown vs Wallace.* 208

SEISIN.

1. A conveyance of land, when recorded, relates back to the time of its execution; and is evidence of a seisin in the grantee from that time, against all persons, except a subsequent purchaser from the grantor without notice. *Pray vs. Peirce.* 381

See DOWER, 3.

PARTITION, 1

SESSIONS.

See HIGHWAYS, 2, 3, 5.

SETTLEMENT.

1. After the provincial act of 7 Geo. 3, c. 3, and before the statute of 1789, c. 14, no settlement could be gained, but by the approbation of the town at a general meeting. *Granby vs. Amherst.* 1

2. A student of a college does not change his domicile by his occasional residence at the college. *Ibid.*

3. The personal occupation of lands, required by the statute of 1789, includes an occupation by others under the direction and control of the owner. *Ibid.*

4. But lands leased are not within the statute. *Ibid.*

5. A seisin and occupation by a minor gave a settlement by that statute, although his lands were in the care of his guardian. *Ibid.*

6. But by the statute of 1793, c. 34, a freeholder, to gain a settlement, must be of full age.

7. When a part of an existing town is detached, and annexed to another existing town, the inhabitants of such part, having a settlement in the town

from which they are detached, acquire by such annexation a settlement in the town to which they are annexed. *Groton vs. Shirley.* 156

8. Where, in an action against the town of *A*, for expenses incurred by the town of *B*, in the support of a pauper, it appeared that the pauper's settlement was not in *A*, but that the defendants were estopped from denying the settlement, and a verdict was given against them; the court refused to set aside the verdict, that the defendants might pay the money found due by the verdict, and thus prevent a judgment, which would bar them upon the question of settlement, as to any after expenses. *Greene vs. Monmouth.* 467

SHERIFF.

1. A sheriff may lawfully take a bond from his deputy, conditioned to pay over one quarter part of *all fees*, which he shall receive as a deputy sheriff. *Mattoon vs. Kidd & Al.* 33

2. An officer, having an execution against one, may lawfully enter the close of the debtor, and cut down, seize, and sell as personal estate, corn or other product of the soil there growing, when ripe and in a fit state to be gathered. *Penhallow vs. Dwight.* 34

3. Where a sheriff has reason to doubt whether goods are the property of a debtor, he may insist on the creditor's showing them to him, and also of being indemnified for any mistake he may make, in conforming to the creditor's direction, either in attaching such goods, or in seizing them upon execution. *Bond vs. Ward.* 123

4. But if he, without making any such claim, undertakes to execute the precept as well as he can, he is answerable for not attaching the debtor's goods when in his power, if the creditor be injured by his neglect. *Ibid.*

5. If the goods of a stranger are in the possession of a debtor, and so mixed with those of the debtor, that the officer, on due inquiry, cannot distinguish them, the owner can maintain no action against the officer for taking them, until notice and a demand of his goods, and a refusal or delay of the officer to redeliver them. *Ibid.*

6. An officer having an execution against *A*, seized the goods of *B*, who

was an inhabitant of another state. It was held that *B* might maintain his action against the officer in another county than that of the officer. *French vs. Judkins.* 229

7. Where an officer had attached goods on an original writ, and pending the action the defendant died, and his administrator took upon him the defence of the action; judgment was rendered against the administrator, and execution thereon delivered to the officer, who delivered up the goods to the administrator. This latter included them in his inventory of his intestate's estate, and on settling his account of administration, the judge of probate assigned to the widow of the intestate all the effects that remained after paying funeral charges, &c. No representation of insolvency was made. It was held that the officer was liable to the judgment creditor for the value of the goods attached by him. *Rockwood vs. Allen, Exr.* 254

8. If an officer, having lawfully seized goods by virtue of a warrant of distress, wantonly removes them to a great distance before the sale, whereby the owner is injured, an action of the case may be maintained against him; but he is not for that cause a trespasser *ab initio*. *Purington vs. Loring.* 388

9. Where an officer returned on a warrant of distress, that he advertised goods distrained twenty-four hours before the sale, he was not permitted to give parole testimony, in an action of trespass against him for taking the goods, that he in fact advertised them forty-eight hours before the sale. *Ibid.*

10. Where the highest bidder at a sheriff's sale refuses to take and pay for the article he bids off, the sheriff may set it up again, and sell it to the highest bidder on such second attempt. *Winslow vs. Loring.* 392

11. A sheriff is answerable to a judgment creditor for the thirty per cent. interest, given by the statute of 1783, c. 44, § 3, when his deputy refuses to pay over moneys received on execution, as well as when the sheriff himself refuses. *Esty & Al. vs. Chandler.* 464

12. A coroner, who is also a deputy sheriff, may serve process upon another deputy of the same sheriff. *Colby vs. Dillingham & Al.* 475

13. A sheriff is answerable only for the

acts of his deputy, done while the relation between them continues: therefore where the deputy of a former sheriff had attached goods on meane process, and afterwards, being the deputy of the present sheriff, refused to serve the execution upon them, the former sheriff was not liable. *Blake vs. Shaw.* 505

14. If a deputy sheriff has attached goods on mesne process, and afterwards the creditor, having obtained execution, require the deputy sheriff to deliver the goods attached to him, so that he may procure his execution to be levied upon them, the deputy is not bound to deliver them, he being himself accountable for them. *Ibid.*

See EXECUTORS & ADMINISTRATORS, 2.

STATUTE.

1. The acts prescribing the limits of counties and towns are public acts, of which the court will judicially take notice. *Commonwealth vs. The Inhabitants of Springfield.* 9

2. The limitation and settlement act (*Stat.* 1807, c. 74) does not extend to actions tried on review. *Hart vs. Johnson.* 472

See ACTION, 5.

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STOPPAGE IN TRANSITU.

1. Where a merchant, in pursuance of a previous general agreement, had shipped goods to one on credit, who, after the shipment, became insolvent, the shipper had still a right to stop the goods *in transitu*; the credit contemplated being predicated on the supposed ability of the consignee to pay at the expiration of the term of the credit. *Stubbs vs. Lund.* 453

2. The right of stopping *in transitu* goods shipped on the credit and risk of the consignee, remains until they come into his actual possession at the end of the voyage, unless he shall before have sold them, and assigned the bills of lading to the purchaser. *Ibid.*

3. And in all cases, where an actual possession of the consignee, after the end of the voyage, is provided for in the bills of lading, the right of stopping *in transitu* remains after the shipment, whether the consignee be the hirer or owner of the ship, or the shipment be made on a general ship. But if the goods are shipped for a foreign market, and are not to be transported to the consignee, the right of stoppage ceases on the shipment. *Ibid.*

STUDENTS.

See SETTLEMENT, 2.

TAXES.

1. One living in the town of *A*, and hiring a store in the town of *B*, in which he deposited a cargo of salt for sale, and also owning and fitting vessels in *B*, is liable to be taxed therefor in

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B. But for his business done there as an underwriter, and for his shares in banks, insurance companies, and other incorporated funds of that kind managed in *B*, he is taxable in the town of *A*. *Little vs. Greenleaf & Al.* 236

See ASSESSORS, 1.

PUBLIC TEACHER, 1, 2.

TEST OF WRITS.

See PLEADING, 3.

TRESPASS.

See AMENDMENT, 1.

EVIDENCE, 3.

OUSTER, 1.

PLEADING, 2.

TRIAL.

1. The decision of the judge at a trial, that the sentence of a foreign court of vice-admiralty is conclusive evidence of the facts alleged in it, does not militate with the rights of parties to a trial by jury, as secured by the fifteenth article of the declaration of rights. *Baxter & Al. vs. N. E. Marine Insurance Company.* 275

See ASSUMPSIT, 2.

TURNPIKES.

1. Where a member of a turnpike corporation declared, at a public meeting of the corporation, that he would spend half his estate, when speaking of the expense of making the proposed turnpike, it was held that such a declaration was no evidence of an express promise to pay the assessments on his shares, and that no action lay thereon against him for the assessments. *Andover, &c. Turnpike vs. Hay.* 102

2. Where a turnpike road was authorized by the legislature, to be located and made from *Bowdoin College* to a certain place in *Bath*, and the Sessione laid out the road seventeen rods distant from the college buildings, and eight rods from the land appropriated to the use of the college, the road was held to be well laid out, within the intent of the legislature. *Stamwood vs. Peirce.* 48

VERDICT.

1. A verdict is not to be set aside, although it be against the positive tes-

timony of a witness not impeached, where there are circumstances in evidence tending to lessen the probability that such testimony is true. *Wait vs. McNeil.* 261

2. Where a general verdict had been found at a previous term, upon a declaration containing several counts, one of which was bad; the plaintiff was permitted, before judgment, to amend the verdict, so as to take it upon such counts only as were good; all the counts being for the same cause of action, and so certified by the judge who sat at the trial. *Barnard vs. Whiting & Al.* 358

3. Where it appears to the court that justice has been done by a verdict rendered in an action, which in point of form was improper, they will not disturb such verdict, but judgment shall be entered upon it. *Booden vs. Ellis.* 507

USES AND TRUSTS.

See DEED, 2.

USURY.

1 *A* conveyed to *B* land of the value of 1600 dollars, for the con-

sideration of 300 dollars; *B*, at the same time, agreeing to reconvey it upon payment of 522 dollars 97 cents at two instalments, the last within three years from the date of the contract: no part of the 522 dollars 97 cents were paid. It was held that *B* was not liable to a *Qui tam* action for taking usurious interest. *Thomes vs. Cleaves.* 361

2. It is not usurious in a banking company to take their notes payable in *Boston* bills, and upon a renewal of the loan to take a premium equal to the difference between those bills and other bills current at the place of the bank. *Portland Bank vs. Storer.* 433

3. Nor is such a transaction within a prohibition in the charter of such company to use their moneys, &c., in trade or commerce. *Ibid.*

See PRACTICE, 3.

WAY.

See GRANT, 1.

EVIDENCE, 3.

WARRANT OF DISTRESS.

See SHERIFF, 8, 9.

END OF VOL. VII.

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